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IN THE

# Supreme Court of the United States.

**OCTOBER TERM, 1898. CASE No. 596.**

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN ADMIRALTY.

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**In Prize.**

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JAMES A. FARQUHAR, OWNER AND CLAIMANT OF THE STEAMSHIP "NEWFOUNDLAND," AND DAVID ROBERTSON & COMPANY, OWNERS OF THE CARGO OF THE SAID STEAMSHIP, APPELLANTS,

*vs.*

THE UNITED STATES, APPELLEE.

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## BRIEF FOR APPELLANTS, OF THEODORE G. BARKER, WITH WHOM IS G. A. R. ROWLINGS.

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### Statement of the Case.

On the 9th of July, 1898, the British steamship *Newfoundland*, Frederick N. Malcolm, master, under charter-party to Musgrave & Company, of Halifax, Nova Scotia, after having been openly engaged for nine days in taking on cargo, left

the port of Halifax with a cargo of flour, bacon, and canned goods under clearances and bills of lading, a part of cargo for Kingston, Jamaica, and a part for Vera Cruz, Mexico.

The charter-party was for a voyage of three months to ports of the United States, West Indies, Central and South America, &c., "including *open* Cuban ports, no contraband of war to be shipped," and the voyage was to terminate at Halifax (*fol.* 14).

Instructions from owner of vessel and from charterers to the master were "to obey instructions of shippers provided they were not at variance with terms of charter-party" (*fols.* 52 and 151). He "was on no account to attempt to enter a blockaded port" (*fol.* 45).

Before sailing from Halifax instructions were given to the master by the shippers, David Robertson & Co., of Montreal, Canada, to proceed first to the island of Cuba and to land the cargo at the port of Caybairien or at the port of Sagua la Grande, provided these ports were not blockaded, and, if they were found to be blockaded, then to proceed to Kingston, Jamaica, and there telegraph owners for instructions (*Transcript, fol.* 45).

Before leaving Halifax Captain Malcolm had inquired of charterers which ports of Cuba were under proclamation of blockade, and was furnished by Musgrave & Company with a map, which showed that Caybairien and Sagua la Grande were open ports (*fol.* 177).

The *Newfoundland*, after leaving Halifax, steered for the West Indies and passed through the "Crooked Island passage" and out into the "Old Bahama channel," and was proceeding on a westward course (*Transcript, fol.* 152), to pass through the Old Bahama channel, on the northern side of Cuba, in the direction of the ports of Caybairien and Sagua, according to her instructions.

On the morning of July 18, before daylight, at 1 o'clock a. m., when about 14 or 15 miles off the harbor of Neuvitas, she was stopped by the United States ship of war *Badger*,

Commander Albert S. Snow; one of the blockading squadron. The *Badger* was first sighted from the *Newfoundland* on her starboard bow, came around, crossed the bow, and steamed up to the *Newfoundland* on her port side; a flash light was thrown upon the *Newfoundland*, and then, after going around astern of the vessel and standing off from her again, a gun was fired by the *Badger* (*fol.* 155).

A boarding officer, Lieutenant Edward McC. Titus, from the *Badger*, came on board the *Newfoundland*, examined her papers, and endorsed on the register of the *Newfoundland* his certificate that he found "her papers to be in accordance with the requirements" (*Transcript, fol.* 154).

Captain Malcolm, of the *Newfoundland*, "asked Lieutenant Titus about the blockade in Cuba," and was told by that officer that "the whole island of Cuba was blockaded. * * * It was blockaded from one end to the other" (*Transcript, fols.* 47, 155, 62, 229).

Before leaving he "asked Lieutenant Titus if there was any danger in his going westward," and was told "there was no danger whatsoever" (*Transcript, fol.* 156).

The master was under the conviction that under his instructions he ought to pass the ports of Caybairien and Sagua (as he said) "to satisfy my charterers that these ports were blockaded" (*fol.* 183), and "I naturally wanted to pass those ports according to my instructions" (*fols.* 51, 183).

Fearing he might create suspicion if, after having been previously running on a west course and after having been stopped by the *Badger*, he should, when released, change his course to the eastward (*fol.* 182), the master of the *Newfoundland*, after leaving the *Badger*, proceeded on his previous course westwardly through the Old Bahama channel (*fol.* 51). He accepted the statements of Lieutenant Titus that all the ports of Cuba were blockaded, and passed Caybairien and passed Sagua la Grande, but did not attempt to enter, although he saw no blockading ships near either of those ports (*fols.* 157, 158). Had he not been diverted

from his course by the false information of Lieutenant Titus he could lawfully have entered the port of Caybairien, discharged his cargo, and fulfilled the instructions of the owners (*fol.* 252). After leaving the *Badger* he considered that his destination was Kingston, Jamaica (*fols.* 43, 45, 50, 52, 151, 182, 183).

At 11 o'clock on the morning of the 19th, at a point in the Old Bahama channel, some 12 miles west of Sagua, he met and was boarded by the United States steamship *Hudson*, another of the blockading squadron, and his papers were again examined (*Transcript, fol.* 159).

After leaving the *Hudson* the *Newfoundland* continued on her west course, and at 6.10 p. m. on July 19 she was stopped and boarded by the United States ship of war *Tecumseh*. According to the calculations of Captain Malcolm, of the *Newfoundland*, the steamship was then 14 miles off the nearest land of the coast of Cuba (*Transcript, fols.* 152, 161, 162, 207). He was advised by the boarding officer of the *Tecumseh* not to go any nearer to the land, and he was told by the executive officer of the *Tecumseh* that there were about 30 blockading ships to the westward of their position; also "if he wished to avoid further trouble with the blockading fleet to keep to the north and west" (*fol.* 146).

He parted from the *Tecumseh*, according to his statement, at 6.30 p. m. (*fols.* 163, 148, 178).

He hauled the ship off one point north of west and steered on that course until 8 o'clock, when, calculating "that he was far enough off," he resumed his west course (*fols.* 218, 219).

At 8.30 p. m. he passed Havana light bearing south, and according to his estimate he was then 17½ miles north of it (*fol.* 164).

He continued his west course until 10.10 p. m., and was still heading west when he was stopped and captured by the United States ship of war *Mayflower*—Commander M. R. S. Mackenzie—at a point, according to the master's testimony,

21 miles; according to Commander Mackenzie's estimate, about 17½ miles, or "perhaps the difference between 17½ and 21," say 19¼ miles, north-northwest half west from Havana light (*fol.* 115). A prize crew was put on board of the *Newfoundland*, and she was taken into the port of Charleston, and there arrested and libeled as prize of war (*Transcript, fol.* 1).

In the original libel it was alleged that the *Newfoundland* was captured "in attempting to violate the blockade which had been proclaimed by the President of the United States to exist at the port of Havana."

Answers were filed on the part of the ship and on the part of owners of the cargo, denying the allegation of the libel, and issue was thus joined (*fols.* 5–10).

After a hearing on the testimony taken *in preparatorio*, the district court found and declared as follows:

"Taking the testimony which alone is now before the court, there is nothing in it which shows, or tends to show, that the *Newfoundland*, at the time of capture, or any other time was heading for the port of Havana, or any other port" (*fol.* 21), and "so far as its examination has extended, no case has been found where a sentence of condemnation was passed upon such a state of facts, as is presented in this record" (*fol.* 23).

The master of the *Newfoundland*, in his answers to the standing interrogatories, had sworn that when captured the *Newfoundland* "was steering her course towards Kingston;" that her course was never altered with the intention of going to or entering any other port at any time. All the witnesses from the ship swore that from 6.30 p. m. to 8 p. m. the course was one point north of west, and that from 8 o'clock p. m. until 10 o'clock p. m., when she was captured, the course of the *Newfoundland* was always west.

The court, in its "opinion," said:

"It also appears that Commander Mackenzie thought the movement and conduct of the *Newfoundland* on the night of the capture suspicious. The court has personal acquaint-

ance with Commander Mackenzie, and knows that in character, intelligence, and attainments he is the peer of any officer of the navy; but, highly as it values his opinion, it cannot accept it in lieu of proof."

The court, however, added:

"It furnishes ground for ordering further evidence" (*fol.* 24).

Accordingly, the United States district attorney was allowed to amend his libel by striking out the words above quoted, and the district court, on August 15, 1898, entered a decree and "opinion" refusing to condemn or release the ship and an order granting leave to either party to take further proof (*fol.* 12).

To this decree, opinion, and order claimants filed exceptions (*fols.* 28–34). The amended libel was filed August 17, 1898 (*fol.* 26), and answers thereto were filed on the part of the ship and of the cargo August 19, 1898 (*fols.* 34 and 37).

The cause was heard upon pleadings and proofs at Charleston, South Carolina, in the United States district court for South Carolina, August 30, 1898, and days following, before Hon. Wm. H. Brawley, United States district judge, who, on 12th September, 1898, filed his "*opinion*" (*fols.* 239 *et seq.*). On 13th September a "*judgment*" of condemnation and forfeiture was rendered against the steamship *Newfoundland* and her cargo as lawful prize of war, and an order for the sale thereof was entered in the district court (*fol.* 258).

Claimants entered their appeal to said judgment, decree, and order (*fol.* 260 to 265), which appeal was allowed by the district court (*fol.* 265), and claimants filed (*fol.* 271 to 275) the following assignments of error:

## Assignment of Errors on Appeal.

1. The court below, the district court of the United States for the district of South Carolina, erred in not releasing the *Newfoundland* and her cargo, on the first hearing, upon the ship's papers and proofs *in preparatorio*, the district judge having, after full argument and consideration, found that there was no evidence before the court upon which the ship and cargo could be condemned, and that—

"Taking the testimony which alone is now before the court, there is nothing in it which shows or tends to show that the *Newfoundland*, at the time of capture or at any other time, was heading for the port of Havana or any other port."

2. The district judge erred in holding, upon the hearing *in preparatorio*, that Commander Mackenzie's opinion, that the movements and conduct of the *Newfoundland* on the night of the capture were suspicious, furnished "ground for ordering further evidence," Commander Mackenzie's opinion not being in evidence at that hearing and being in itself no legal ground for such order.

3. The district judge erred in his decree granting leave to plaintiff to amend its libel upon which the issue had been made and joined and the hearing had been had, and to make a new case upon new pleadings and new proof, there being no evidence before the court of any attempt to break the blockade.

4. The district judge erred in his decree of August 15, in allowing plaintiff to make further proof, the facts of the case, as found by the district court (opinion and decree, filed August 17), affording no legal foundation for doubt and affording no proof of any overt act to justify the condemnation of the ship.

5. The district judge erred in overruling the exceptions

of respondents to the decrees of August 15 and 17 and in trying the case on further proofs.

6. Upon the second hearing the district judge erred in admitting as evidence of facts the testimony of the officers of the *Mayflower* and *Tecumseh*, consisting of attempts to locate the positions of the steamship *Newfoundland* on the ocean in reference to Havana light, her position when she met the *Tecumseh*, and the positions of the *Newfoundland* and of the *Mayflower* at various times; also undertaking to locate on the chart those positions so attributed to the *Newfoundland*, to the *Tecumseh*, and to the *Mayflower*, and to give the latitude and the longitude, the witnesses having all declared that those positions were located without taking observations at the times and were merely approximate estimates, and such estimates being based on wholly incomplete and insufficient data of calculation, and not being legal proof.

7. The district judge erred in disregarding the uncontradicted and unimpeached testimony of the master of the *Newfoundland* which located the course of the ship during the voyage through the Old Bahama channel and to the point of capture and the successive positions of the ship on her westward course, her positions having been taken at the times stated by actual observation and located on the ship's chart by the ship's log and other sufficient data.

8. The district court erred in accepting as proof the estimates and opinions of the officers of the *Tecumseh* as to the time of her meeting and the time of her leaving the *Newfoundland* on the afternoon of 19th July, and basing his decree upon such estimates and opinions, without evidence of fact upon which such estimates and opinions were based, and against the otherwise uncontradicted evidence in the cause, and in disregarding the evidence which impeached the accuracy of such estimates and opinions.

9. The district court erred in finding, as a conclusion of fact, that the *Newfoundland* had "loitered" in passing the

port of Havana, such conclusion being based upon a theory of inference from assumed times, places, and rate of speed of the *Newfoundland*, none of which were or could be proved to be correct, and most of which differed from that shown by the unimpeached testimony in defense, and which assumptions, theory, and inferences were shown to be incorrect.

10. The district court erred in accepting the theory and inference of "loitering" as evidence in the cause, and as proof of an overt act, committed by the *Newfoundland* in violation of the blockade established by the United States Government of certain ports on the island of Cuba.

11. The district judge erred in holding that the ocean at a point 10 miles off from the shore at Havana and at the point of capture, a point 18 to 21 miles off from Havana, both points being outside of the cruising ground of the blockading fleet, was prohibited water, and that the *Newfoundland* had been seen or taken within blockade waters.

12. The district judge erred in holding that the marine trespass committed by the commanding officer of the *May flower* upon the property of neutrals, by seizing the ship *Newfoundland* and her cargo, was justified by the alleged suspicious circumstances in the case, there being no overt act proved and no fact established in proof to which suspicion of intention could legally be attached to make out a case for condemnation of ship and cargo as lawful prize of war.

13. The district judge erred in holding as a conclusion of fact that the *Newfoundland* was captured when she was so near Havana entrance as to compel the conclusion that her purpose beyond a doubt was to enter that port.

14. The district judge, after admitting that there was "no proof that the *Newfoundland* was seen to be heading for the port of Havana," and that the testimony as to her suggested loitering "falls very far short of the proof offered" in cases cited by the plaintiff, erred in holding that a steam vessel which in the night-time passes a port "near enough to see

signals from shore" (although none be proved to have been seen or made) "thereby lays herself under the unavoidable imputation of being engaged in an attempt to break the blockade," and that "there is therein a necessary presumption of sinister motive," although the proof be that when captured she had passed the port and was 18 to 21 miles away from it, sailing on a westward course, and although the proof be that her fullest steaming capacity was not more than eight knots per hour.

15. The district judge erred in holding "that the *Newfoundland*, with full knowledge of the blockade at Havana, approached sufficiently near to that port on the night of July 19th to render it easy to elude the blockade, and tarried there sufficiently long to enable her to discover whether she could do so with safety," the proof of plaintiff being that the port of Havana was most thoroughly guarded by a strong blockading fleet; that the master of the *Newfoundland* had been told by the mate of the *Tecumseh* about six o'clock p. m. of the same day that there were 30 warships blockading that port; that the *Newfoundland* had never been nearer than ten miles from the Havana entrance, had never been nearer than two miles away from the outside lines of the blockading fleet, and when captured had passed Havana and was between 18 and 21 miles to the northwest of that port, sailing on a westward course away from the island of Cuba and in the waters of the gulf of Mexico, and there being no proof of her tarrying near to the port of Havana to sustain a legal conclusion of fact.

CHARLESTON, S. C., *September* 28, 1898.

THEODORE G. BARKER,
*Proctor for Respondents, Appellants.*

## Point First.

The district court erred in not releasing the steamship *Newfoundland* and her cargo on the first hearing upon the ship's papers and proof *in preparatorio*, the district judge, after full argument and consideration, having found that there was no evidence before the court upon which the ship and cargo could be condemned, and that "taking the testimony now before the court there is nothing in it which shows or tends to show that the *Newfoundland*, at the time of capture or at any other time, was heading for the port of Havana or any other port."

The "judgment" and "opinion," filed August 15 and 17, 1898, was a judicial finding of fact on libel and answers upon testimony taken and argument heard upon all the issues. It constituted a solemn adjudication of the question raised of lawful prize of war, and the conclusion reached by the court upon the evidence entitled the claimants of the vessel and cargo, as matter of legal right, to a judgment of immediate restitution. According to the approved rules of admiralty courts, the adjudication decided the question of justifiable seizure and lawful prize, on the one hand, as against a marine trespass and seizure without probable cause, on the other, and it terminated the rightful jurisdiction of the court over the subject of capture by removing as *res judicata* the only legal ground for seizure and arrest.

The district judge at the hearing had ruled, with unquestionable accuracy, that a statement in writing, prepared by the capturing officer, Commander M. R. S. Mackenzie, expressing his suspicions, and pasted by him on the log book of the steamship *Newfoundland* on the night of July 19, at the time of the capture, and so brought before the prize commissioners and returned by them to the court as part of the proof *in preparatorio*, was not admissible as evidence and could not be considered at the "hearing upon ship's papers and preliminary proof," such statement being no part of the

ship's papers, and that as the author of the statement, if present, could not be heard to testify directly, so he could not by means of such statement so pasted on the log bring his testimony indirectly before the court at such hearing.

After so ruling the district judge, with grave inconsistency with his said adjudication and ruling, declared in his filed "opinion" as follows:

"It also appears that Commander Mackenzie thought the movements and conduct of the *Newfoundland* on the night of the capture suspicious."

And therefore the court ordered "further proof."

It is respectfully submitted that the district judge erred in so holding. It nowhere appeared in the legal evidence in the case what Commander Mackenzie thought, beyond what might be inferred in all cases from the bare fact of seizing and "sending in" as prize of war a vessel captured on the high seas. What a capturing officer thought as to the movements and conduct of the suspected vessel, we submit, is not evidence upon which a prize court could base its proper judicial action.

To admit such opinion or suspicion as evidence or as the sole basis of an order of a prize court against a claimant is to do away with the wholesome rule of international law and practice, which limits most carefully and scrupulously in all cases the proof at the first hearing to the ship's papers and testimony taken *in preparatorio* and takes that evidence as *conclusive*.

Besides this, the district court had expressly ruled out the statement, pasted on the log, of what Captain Mackenzie said and thought, as incompetent and not proper to be considered at the hearing on preparatory proofs, and the evidence that "Commander Mackenzie thought the movements and conduct of the *Newfoundland* on the night of the capture suspicious" was not before the court.

What legal ground, then, does the order of August 15, 1898, for "further proof" find to stand on?

It surely cannot be sustained on the knowledge of the presiding judge of what Commander Mackenzie thought, coming to the court, not through any legal evidence taken in the cause, but irregularly, through a statement of the capturing officer, improperly pasted on the ship's log, which had been ruled out as incompetent.

Nor can such order be sustained legally upon the "personal acquaintance" of the presiding judge with Commander Mackenzie, nor upon his estimate of that officer's merits.

Yet it appears, in the "opinion" filed August 17, 1898, as the sole ground for ordering further proof (*Transcript, fol.* 24), thus:

"The court has personal acquaintance with Captain Mackenzie and knows that in character, intelligence, and attainments, he is the peer of any officer in the navy; but highly as it values his opinion, it cannot accept it in lieu of proof."

*But*, the court added,

"It furnishes ground for ordering further evidence."

It was said by Sir William Scott in *The Glierktigheit*, 6 C. Rob., 58. N. (*a*):

"When the facts are positively denied and that denial cannot be invalidated by any adequate means of estimating the credit of the witnesses, there is no other way of proceeding but by laying out of the case all of this extraneous matter and by recurring to the original evidence. *The court cannot attach itself to personal considerations* and say this is the affidavit of such a *gentleman* and that of an *ordinary* person; it cannot decide on grounds so vague and unjudicial as those of mere rank and situation in life; those are grounds to which it is impossible for me to advert in any manner that can produce a conclusion."

For the exercise of the jurisdiction for such order for "*further proof*" the district judge cited as authority the language of the Chief Justice in the *Sir William Peel*, 5 Wall., 534:

"If upon this evidence the case is not sufficiently clear to warrant condemnation or restitution opportunity is given by the court, either of its own accord, or upon motion and proper grounds shown, to introduce additional evidence under an order for further proof."

Conceding that under certain circumstances the district court has the discretionary power to order further proof, we submit that the discretion so exercised must be *a legal discretion*, based upon legal grounds, and not a vague discretion, unsupported by legal evidence or resting merely upon extrinsic suggestions of suspicion.

The authority cited, if taken as the true expression of the rule, does not sustain the action of the district court. The language of the rule, as stated by Chief Justice Chase, is this:

"If upon this *evidence* the case is not sufficiently clear to warrant condemnation or restitution." * * *

There must then, to begin with, be "evidence" against the ship or cargo, and upon such evidence the case must be "*not sufficiently clear.*"

According to the explicit finding of the district court in the case of the *Newfoundland*, there was absolutely *no evidence* upon which condemnation could rest.

The finding of the district court is thus stated (*fol.* 21):

"Taking the testimony, which alone is now before the court, there is nothing in it which shows or tends to show that the *Newfoundland* at the time of capture or at any other time was heading for the port of Havana or any other port."

To the findings and conclusion of fact no exception on the part of the libellant was taken, and they stand on the record as *res judicata*.

It thus being not a case of insufficient evidence or of "evidence not sufficiently clear," but a case of total absence of evidence, restitution, as for an unjustifiable arrest, should have followed as a necessary, logical, and legal consequence.

Again, in such cases—that is, cases where there is some evidence, but that evidence is not sufficiently clear—"opportunity is given," says the Chief Justice. Given to whom? The cases show that it is primarily given to the claimant of the property, against whom the original evidence shows some ground for doubt or some matter requiring explanation.

No case can be found where, in absence of all evidence to condemn, opportunity has been given to *captors* to hunt up evidence or to make a case *de novo* against a claimant.

There must be a foundation laid in the original evidence to support the call for "further proof."

*The Liverpool Packet*, 1 Gall., 525.

"Further proof may be considered as that proof but for which the ship in question would be condemned on the evidence *in preparatorio* before the court in the first instance, and is primarily a privilege granted to claimants (except in cases of fraud on their part) to put the captured ship to the explanation of circumstances 'pregnant with suspicion.'"

*Browne's Civ. & Ad. Law*, vol. 12, pp. 452 & 453.

The district court, in this case, reversed the rule and, finding *no proof* against the *Newfoundland*, practically held that the ship and cargo would not be released if the captors could produce some proof against her, and it gave that privilege and opportunity of "further proof" to *the captors*, really to enable them to make a case.

Ch. J. MARSHALL:

"It is certainly a general rule in prize causes that the decision should be prompt, and should be made, unless *some good reason* for departing from it appears on the papers and testimony afforded by the captured vessel. * * * This rule should be *held sacred* in the whole description of causes to which the reasons on which it is founded are applicable. The usual controversy in prize causes is between the captors and captured. * * * But the captured vessel may be neutral and may be captured on suspicion. This is a grievous vexation to the neutral, which ought not be increased by prolonging his detention *in hope that something may be discovered from some other source which may justify condemnation.*"

*The George*, 1 Wheaton, 408.

"The practice of the prize courts is to confine the first hearing of the cause to the papers found on board the ship and the preparatory examinations. If they acquit or condemn, there is in general an end of the cause; *if they present a case of doubt or difficulty*, further proof is admissible."

*The Anne Green*, 1 Gallis, 274.
*The Sarah*, S. C. Rob., 330.

STORY, J.:

"It is upon the ship's papers and the examination thus taken in preparatory, that the cause ought in the first instance to be heard in the district court, and, upon such hearing, *it is to judge* whether the cause *be of such a doubt as to require* further proof, and if so, whether the claimant has entitled himself to the benefit of introducing it. If the court should deny such order when it ought to be granted, or *allow it when it ought to be denied*, and the objection be taken by the party, and appear upon the record, the appellate court can administer the proper relief."

*The Pizarro*, 2 Wheaton, 227.
*The Springbok*, 5 Wall., 1.

STORY, J.:

"It is the established rule in courts of prize, that the evidence to acquit or condemn must in the first instance come

from the papers and crew of the captured ship. * * * It is exclusively upon these papers and the examinations taken *in preparatorio*, that the cause is to be heard in the district court. If from the whole evidence, the property clearly appear to be hostile or neutral, condemnation or acquittal immediately follows. If, on the other hand, the property appear doubtful, or the case be clouded with suspicions, or inconsistencies, it then becomes a case for further proof, which the court will direct or deny, *according to the rules which govern its legal discretion on this subject.*"

*The Dos Hermanos*, 2 Wheaton, 76.
*The Pizarro*, 2 Wheaton, 227.

SIR JOSEPH JEKYLL:

* * * "As it is said in *Rook's case*, 5 Rep., 99*b*, that discretion is a science, not to act arbitrarily according to men's wills and private affections, so the discretion which is executed here is to be governed by the rules of law and equity;" * * *

*Cowper vs. Cowper*, 2 P. Wm., 753.

"Discretion without rule ceases to be law and becomes a most dangerous and tremendous power. When applied to a court of justice it means a sound discretion guided by law; it must be governed by rule and not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular (*Rex vs. Wilkes*, 3 Burr, 2539).

*Witman vs. Ely*, 4 Sergt. & R., 265.

*The Haabet*, 6 C. Rob., 54, was the case of a Danish vessel taken near Dunkirk on a voyage from Frederickstadt to L'Orient and proceeded against for a breach of the blockade of that port. The master had stated in his depositions "that he was twelve English miles from Dunkirk when he first made land, that he had shaped his course for the channel and was steering for L'Orient at the time of capture."

"On this evidence Lawrence contended on the part of the claimant that it was a case of *immediate restitution*, and that there was nothing on the face of the transaction that could in any manner justify a demand for captor's expenses. * * *

"On the part of the captors, the King's advocate, in reply,

pressed strongly upon the court the hardships to which persons employed on the blockading service would feel themselves exposed if the vessel was to be released immediately upon the representation of the neutral master without affording the captors an opportunity of giving their statement of what passed at the time of capture, so far at least as to justify the seizure and to entitle them to their expenses."

But Sir William Scott said (italics ours):

"The first source of information to which the court usually resorts is the evidence of the persons on board the captured ship. Among the interrogatories addressed to them there are some on which the captors might be supposed to be equally qualified to supply information, the number of the crew, the place of capture, and many other circumstances which are included in the number of standing interrogatories are as much in the cognizance of the captors as of the other parties. *The general rule of law, notwithstanding, is, that on all points the evidence of the claimants alone shall be received in the first instance, and if no doubt arises upon that view of the case the court is bound by the general law, as well by the act of the British legislature, to take those points as fully demonstrated.* It is a possible thing indeed that the witnesses may be forsworn, and that much injustice may be done, as in all references to human testimony dangers of that kind may be encountered. Courts of justice must nevertheless proceed on general principles. * * * The rule by which this court has always been guided is, I believe, conformable to the general practice of all the nations of Europe which directs the evidence to be taken from the persons on board the captured ship. * * * *The rule, then, being to take the original evidence of the claimant as conclusive*, if not impeached, I feel myself bound to pronounce that the depositions in this particular case are as void of suspicion as any which the court is in the habit of perusing. The ship appears clearly to be the property of a merchant in Norway. * * * The master says to the third interrogatory 'that he was twelve miles from Dunkirk which bore S. SE., &c. * * * *' The mate and the other witness speak to the same effect. Then, what is there to be placed in opposition to this account? *Merely a suspicion* arising from the circumstance that Dun-

kirk happened to be the first land which the vessel had made. * * * Under the defect of all circumstances of suspicion *in the original evidence*, the court is called upon to admit the affidavits of the captors. * * * If I should accede to this demand the consequence would be that I must do it upon a uniform principle of admitting affidavits universally and in all cases though there be nothing to excite suspicion *in the original evidence* and though the language of all the witnesses is as precise as possible. I can come to no such conclusion. It would, I think, be productive of great mischief on all sides. It might throw into the way of captors a temptation to exceed their line of duty and the exact bounds of justice and of truth, and it could not fail to impose upon the court a most unpleasant difficulty in the exercise of judicial functions. For how could the court decide? Counter-affidavits must be introduced which would necessarily be contradictory. Which should the court believe? *Can it be maintained that the preference should be given to the captors*, and *that* in opposition to the general rule that the claimant shall not be condemned except on evidence coming out of his own mouth or arising on the clear circumstances of the transaction? If this rule is unsatisfactory to captors it is nevertheless that which the law prescribes. It is my duty to take care that the rules of law are observed and that the rights of war are not exceeded, and certainly in no cases more than in this particular branch of the law of nations which must in its nature operate with severe restraint upon neutral commerce."

In the case of the *Newfoundland* the master had sworn, on his examination *in preparatorio*, that he had not entered or attempted to enter any Cuban port; that he had not altered his course at any time with the intention of entering any such port; that when captured he had passed, on his westward course, the port of Havana, and was 21 miles to the N. N. W. $\frac{1}{2}$ W. from the light, heading west and bound for Kingston, Jamaica, and the district judge had found and adjudged that on the testimony "there was nothing which shows or tends to show that the *Newfoundland* at the time

of capture was heading for the port of Havana or any other port."

There was, then, no ground for "doubt." It was not a case "clouded with suspicions or inconsistencies" or "pregnant with suspicion." There was a total "defect of all circumstances of suspicion in the original evidence," and there was no excuse on any legal ground for the order for further proof or for refusing an order for immediate restitution of ship and cargo upon the first hearing. In the case of the *Madonna* (4 C. Rob., 169) there was "vehement suspicion" as to the cargo being enemy's property, and also on account of the spoliation of some papers. The property, however, was restored with demurrage and compensation (pp. 169, 170, 171, 175, 176, 182, 183).

"The evidence to acquit or condemn with or without costs or damages must, in the first instance, come *merely* from the ship. * * * If there do not appear from thence ground to condemn as enemy's property or contraband goods going to an enemy, *there must be an acquittal*, unless from the aforesaid evidence the property shall appear *so doubtful* that it is reasonable to go into further proof. * * *

"The degree of proof to be required depends upon the degree of suspicion and doubt that belongs to the case. In cases of *heavy suspicion* and *great importance* the court *may* order what is called 'plea and proof'—that is, instead of admitting affidavits and documents introduced by the claimants only each party is at liberty to allege in regular pleadings such circumstances as may tend to acquit or condemn the capture and to examine witnesses in support of the allegation." * * *

1 *Am. State Papers* (*For Rel.*), 494, *ff* (Opinion on the general principles of proceeding in prize courts, drawn up in the form of a letter to Mr. Jay, on the behalf and at the request of the United States Government, by Sir William Scott and Sir J. Nicol, in 1794).

3 *Wharton Internat'l L. Digest*, sec. 330, pp. 211, 212, 213.

In the case of the ship *Liverpool Packet* (1 Gallison's Rep., 525), STORY, J., said:

"It is well known that the prize court is studious to preserve simplicity in its proceedings and rarely admits the captors to the benefit of further proof, except in cases of *strong suspicion.*"

"§ 511. A peculiarity of prize proceedings is that the evidence upon which the case must be heard in the first instance and on which the property must be condemned or acquitted, must come entirely from the vessel taken, the papers on board the vessel and the testimony on oath of the master and other persons attached to the vessel and on board at the time of the capture. This peculiarity is of the very essence of the administration of prize law" (*Benedict's Admiralty*, p. 302).

Such being the law, appellants ask from this court a judgment reversing the decrees and orders of the lower court, and an order of restitution of the ship and cargo, with costs and damages as for a seizure without probable cause.

THE NEWFOUNDLAND AND CARGO WERE ENTITLED TO THEIR DAMAGES AND COSTS.

In the case of *The Olinde Rodrigues*, May 15, 1899 (*U. S. Reports*, vol. 174, p. 511), this court held as follows (on p. 539):

"The entire record considered, we are of opinion that restitution of the *Olinde Rodrigues* should be awarded, without damages, and that payment of the costs and expenses incident to her custody and preservation and of all costs in the case, except the fees of counsel, should be imposed upon the ship."

But the restitution in that case, *without* damages, and with costs imposed upon the captured vessel, was after hearing upon "plea and proof," and was expressly based upon the unanimous judgment of the court—that *upon the evidence* there was *shown to be probable cause* for the capture. The court say (on p. 535):

"But on the other hand we are bound to say, that, taking all the circumstances together and giving due weight to the evidence on behalf of the captors, probable cause for making the capture undoubtedly existed and the case disclosed does not commend the vessel to the favorable consideration of the court."

The court in the opinion say (the italics are ours):

"Probable cause exists *where there are circumstances sufficient to warrant suspicion*, though it may turn out that the facts are not sufficient to warrant condemnation * * * (p. 535). The vessel was boarded and warned by the *Yosemite* on July 5 and the warning entered on her log. This imposed upon her the duty to avoid approaching San Juan, on her return, so nearly as to give just cause of suspicion, *yet she so shaped her course as to invite it* (p. 538).

"When the *New Orleans* succeeded the *Yosemite*, her commander was informed of the facts by his predecessor and knew that whatever the right the *Olinde Rodrigues* had to be in those waters she could not place herself so near as to be able to break the blockade with impunity. But when he sighted her *she was on a course to all appearance directly into that port, and steadily pursuing it.* And when he signalled, the *Olinde Rodrigues apparently did not obey*, but seemingly *persisted on her course*, and that course would in a few moments have placed her within the range of the guns of Morro and of the shore batteries. In fact when the gun was fired she was within the range of the Morro's guns. The evidence is overwhelming that she did not change her course until after the shot was fired, even though she may have stopped as soon as she saw the signal * * * The *disregard of her duty* to shun the port and not approach *was so flagrant* that the intention to break the blockade was to be presumed, though we do not hold that that was a presumption *de jure*" (p. 538).

If, in the case of the *Newfoundland*, the conclusions of the district court on the hearing, on the ship's papers and testimony *in preparatorio*, which were not excepted to by the captors, is to be accepted as a true report of the evidence, and if, as found by the district judge on said hearing,

"taking the testimony now before the court, there is nothing in it which shows or tends to show that the *Newfoundland* at the time of capture or at any other time was heading for the port of Havana or any other port," and if no overt act and no circumstance of suspicion was established in proof, as the record shows, then it was a case where there were *not* "circumstances sufficient to warrant suspicion," a case where there was *not* "probable cause," as it is defined by this court, for the capture of the *Newfoundland* and her cargo, and a case where the neutral innocent owners were entitled on preliminary hearing not only to restitution, but also to their full damages and costs.

"The ship and cargo should be restored with full damages and costs."

*The Vriendschap* (6 C. Rob., 38).

"Restitution must be restitution in original value."

*The Der Mohr* (3 C. Rob., 129).
*The Same Case* (4 C. Rob., 317).
*The Lucy* (3 C. Rob., 208).
*The Concordia* (2 C. Rob., 103).
*The Peacock* (4 C. Rob., 185).
*The Anna* (5 C. Rob, 383).

In the note (*The Concordia*, 2 C. Rob., 101) it is said:

"It is a reasonable and fair profit on the commodity that is due, reference being had to the original prices actually paid by the exporter and expenses which he has incurred."

In *The Haabet* (2 C. Rob., 183) the court said:

"As to what is to be deemed a reasonable indemnification and profit, I hope and trust that this country will never be found backward in giving a liberal interpretation to those terms."

See also 1 Gall., 318, and 1 Gall., 293.

According to precedents this is clearly a case for restitution with full damages.

See *The Wren* (6 Wallace, 582).

In this case the vessel had previously run the blockade at Galveston. One of the crew had heard she belonged to the Confederates. A Confederate agent at Havana had appointed the master to the charge of the vessel. The purser believed she was owned by a firm, one of whose members was a citizen of the Confederacy. The court decided that such proofs were of a loose character and such as did not rise to the dignity of evidence. Vessel restored.

*The Watchful* (6 Wallace, 93):

"The record as it stands shows that the vessel cleared for Hamburg when her destination was certainly Matamoras (Mexico); that her clearance was probably altered after she was at sea by writing over the word 'Hamburg' the word 'Matamoras;' that a false manifest was used, and the fact of the main cargo of 252 cases of arms being on board was carefully *concealed* from the officers of the customs at New York, from which port she sailed." * * *

"It is very clear that there is no case of prize made out by the evidence. The property, which was undoubtedly Wallis', was therefore not enemy property, nor is there any evidence of intention to break the blockade or to trade with the enemy. The case is so destitute of all the elements of prize that the present libel was properly dismissed."

See also—

*The Flying Scud* (6 Wall., 263).
*The Sea Witch* (6 Wall., 242).
*The Dashing Wave* (5 Wall., 176).
*The Science* (5 Wall., 178).
*The Volant* (5 Wall., 174).

## Point Second.

*Upon the second or final hearing the district judge erred in admitting as evidence of facts and in adopting as proof the testimony of the officers of the Mayflower and of the Tecumseh, consisting of attempts to locate the positions of the steamship Newfoundland on the ocean in reference to Havana light, her position when she met the Tecumseh, and the position of the Newfoundland and of the Mayflower at various times; also consisting of attempts to locate on the chart those positions so attributed to the Newfoundland, to the Tecumseh, and to the Mayflower, and to give the latitude and longitude, the witnesses having all declared that those positions were located without taking observations at the time and were merely "approximate estimates," and such estimates being based on wholly incomplete and insufficient data of calculation, and not being legal proof.*

The testimony on "plea and proof," like that taken "*in preparatorio*," failed to disclose any *overt act* on the part of the ship of a hostile character, to which act "suspicious circumstances" could be attached, to make a case for condemnation.

In absence of all such evidence in the original, or "further proof," resort was had by the captors to a charge against the ship of having "loitered," between 5.35 and 8.20 p. m., July 19, on her journey past Havana, with the intention of entering that port, notwithstanding the fact that when captured, at 10.10 p. m., she had passed that port and was 21 miles N. N. W. $\frac{1}{2}$ W. from Havana light, steaming west, away from the island of Cuba, and in the waters of the Gulf of Mexico.

His honor, the district judge, allowed the captors to introduce a "tracing," composed by Lieutenant Culver, of the United States war ship *Mayflower*, on the day after the capture, from "approximate estimates" as to time and place,

made by officers of the United States ships of war *Tecumseh* and *Mayflower*, for the purpose of illustrating and supporting a theory of "loitering," suggested by Commander Mackenzie and based upon inferences, without a solitary fact being proved, from which inferences was deduced the suspicion of intention on the part of the master of the *Newfoundland* to enter Havana. This inferred-"loitering" *theory* was allowed the place of an "overt act" and was adopted by the district court as the basis of its judgment condemning the ship and cargo; thus (*fol.* 250):

"Taking the point of departure to be somewhere within the circle already described and the time of departure at 6.30 and the rate of speed at nearly 8 knots and following the courses described—west by north until 8 o'clock and then due west until 10 o'clock—and platting it upon the chart, I must consider that she would have been some miles farther west than either the point claimed by her or the point testified to by the officers of the *Mayflower* as the point of capture at 10 o'clock, unless she had loitered somewhere upon her route."

And at folio 251 thus:

"My conclusion is that the *Newfoundland*, with full knowledge of the blockade at Havana, approached sufficiently near to that port on the night of July 19 to render it easy to elude the blockade, and tarried there sufficiently long to enable her to discover whether she could do so with safety, and this finding renders it necessary for her to show from all the circumstances preceding, accompanying or following, that act, that her presence there was innocent."

We deny that "loitering" can be correctly held to be an "overt act," or that it can be accepted as such "overt act" as international law requires shall be shown in justification of a capture. It is a charge which on its face is of so vague and uncertain a nature as to be incapable of reliable proof. The idea of "loitering" lacks the definiteness and positiveness which is the very essence of "overt act." It is far

more of the nature of a conclusion of law than of fact. How would "loitering" be proved or disproved? Of what act or acts does it consist? In the present case, the charge is based upon the assumption that international duty required the *Newfoundland* to pass Havana at her highest rate of speed capacity; that she did not perform this supposed duty, but consumed more time than she ought to have consumed in steaming over a given number of miles.

We know of no such international duty, nor do we know upon what principle a prize court would be able to determine how much time a neutral vessel sailing on a natural course on the highway of the ocean "*ought to consume*" in passing in front of a blockaded port.

We protest that such an issue should not have been allowed in evidence on trial.

The proof offered was, as might have been expected, wholly insufficient to sustain the charge.

## The "Tracing" Prepared by Lieutenant Culver.

The tracing prepared by Lieutenant Culver, of the *Mayflower*, on July 20, which the captors were allowed to introduce, was made up from hearsay information and "approximate estimates" furnished to him on the day after the capture by officers of the *Tecumseh*, as to the respective positions supposed to have been held by the *Newfoundland* and *Tecumseh* before 6.30 p. m., July 19, combined with "approximate estimates" by officers of the *Mayflower*, made also on the day after the capture, of the respective positions ascribed to the *Newfoundland* and to the *Mayflower* at 8.20 and at 10 p. m. of the 19th. By this tracing it was attempted to be shown to the court that the *Newfoundland* had "loitered" off Havana between 6 and 8.20 p. m.

After the argument of the case the court requested the respective opposing parties to mark on the chart (which had been introduced in evidence on the trial on the examination

of Captain Malcolm and which showed the course and position of the steamship *Newfoundland* on her voyage from Halifax to the point of capture) the various positions mentioned in the testimony—that is, those of the *Newfoundland*, as testified to by the master, and those of the United States ship of war *Mayflower* and of the United States ship *Tecumseh*, and also of the *Newfoundland*, as located on the tracing prepared by Lieutenant Culver (*fol.* 238).

When the "tracing" was introduced counsel for claimants at once objected, protesting "that the testimony of the witnesses for the plaintiff who undertook to fix the position of the several vessels and to locate the same on the diagram or on the chart was incompetent and either hearsay or mere guesswork" (*fol.* 125).

The objection was overruled and the testimony admitted; to which proctor for respondents excepted (*fol.* 238).

The chart of Captain Malcolm was properly in evidence to show the positions of the *Newfoundland* on her voyage, because the positions there noted were testified to by him as positions ascertained by himself as navigator of his ship, by actual "observations" taken by him, an expert, according to known scientific, mathematical, or astronomical rules, noted by him at the times and entered from those notes on his chart. It was thus the official cotemporaneous record of the hourly movements of the *Newfoundland* up to the moment of her capture (*fols.* 153, 159, 160, 170, 172, 192). No exception was taken to its introduction in evidence.

On the other hand, the diagram or tracing and the positions noted on the "tracing" and afterwards on the chart are all testified to be from "estimates" made by officers of the *Tecumseh* and *Mayflower* "approximately" *after* the capture; and this is so notwithstanding the fact that Commander Mackenzie, in using the permission of the court to note on Captain Malcolm's chart the positions of the vessels, has repeatedly used the words "cotemporaneous memoranda."

The theory of Commander McKenzie, adopted by the district judge, assumed that the *Newfoundland*, on July 19, left the *Tecumseh* at 5.35 p. m., at a point assumed to be 10¾ miles from Havana light, and that she was supposed to have been sighted by the *Mayflower* at 8.20 p. m. at a point about north from Havana light 10 miles, the latter point being assumed to be distant from the former 12 miles. It was also assumed that the *Newfoundland's* rate of speed was eight miles an hour, and that between 5.35 and 8.20 she "ought to have" traversed 24 miles; that as she had only traveled 12 miles she *must* have "loitered" on her journey between those assumed points, and that if she did so "loiter" it *must* have been with the intent to enter Havana (*fol.* 93).

In answer to this *theory* the ship and cargo contended that the *Newfoundland* left the *Tecumseh* at 6.30 p. m., and, allowing time for getting under way, say about 6.40, that when she started she was then much farther from Morro than 10¾ miles; that at 8.20 she was 17 miles from Havana light, and that her rate of speed was 7⅓ and not 8 knots per hour. They deny that the *Newfoundland* at any time intended or attempted to enter Havana; deny that she "loitered" on her journey at any time, and they assert, that she made between 6.30 and 10 p. m. her average rate of speed throughout her voyage.

It will, we presume, be admitted that to establish such a theory in proof it was essential that "the point of departure" *from* which, and the place of arrival *to* which, the time consumed, and the distance run were to be calculated—should be fixed in evidence beyond a possibility of doubt. Instead of this essential accuracy in proof we find in the testimony only guesswork.

Lieutenant Evans, of the *Tecumseh*, who furnished the material for Lieutenant Culver's "tracing," said (*fol.* 141):

"Q. Can you give her position at the time of boarding?
"A. At the time of boarding, I *estimated* her position to be *about* latitude 23.15 north, longitude 82.13.

"Q. Look at that tracing and see whether you can trace her location on that tracing. (Hands paper to witness.)

"A. The location that is placed here inside of the large dotted circle is *approximately* the correct position of the vessel at the time of boarding.

"Q. In what part of the large circle?

"A. I *should say about* the center of the circle; it was within that circle. I would not place her position closer than three miles."

On cross-examination he said (*fol.* 143):

"Those calculations that were referred to on that chart as designating the probable position of the *Newfoundland* at the time you met her, were they taken by observation?

"A. They were not; they were *estimations.*"

A. R. Nickerson, executive officer of the *Tecumseh*, was also examined as to the positions noted on the tracing prepared by Lieutenant Culver the day after the capture. On cross-examination he said (*fol.* 148):

"Q. When was the latitude and longitude mentioned on that chart taken?

"A. The position was corrected *at noon* by cross-bearings.

"Q. That put down on the chart, is that taken by observation?

"A. No; from bearing in the tower.

"Q. That latitude and longitude?

"A. That latitude and longitude, the position at the time of overhauling, is *estimated—estimated from* 12 *o'clock aboard of our ship.*

"Q. If you are able to state the latitute and longitude why can't you state exactly her position, instead of stating it within 3 miles?

"A. You see we had run 4 or 4¼ miles, and a big heavy set of current from the Gulf Stream close in shore.

"Q. Running eastward from west?

"A. The current was running east; we were running northeast; the current was running to the eastward."

Now, this run of four or four and a half miles was from no certain or ascertained point in the ocean—"6 *or* 8 *miles*

from the light" (that is, Morro light) and "*about* 3½ to 4 miles from the nearest shore" is the witness' *estimate* of the position of the *Tecumseh* at the time she sighted the *Newfoundland* (*fol.* 14). Lieutenant Evans had testified that to be the "*usual* place" of the *Tecumseh*, and as to her movements (*fol.* 142):

"Q. Was that your usual place?

"A. At that time that was my usual position, *drifting with the current*, maintaining a position between the bearings that were prescribed.

"Q. What were those bearings?

"A. At that time, southwest by south, and southwest by west, Havana light between those bearings.

"Q. Were you under steam?

"A. Yes, at the time of sighting the light I was *probably drifting*, the engine not turning over, *or I might have been* steaming very slowly, just turning over."

The duty assigned to the *Tecumseh* was to cover by "drifting," or "steaming slowly," or steaming faster, as might be, a segment of a circle between those bearings—that is to say, to pass from a point from which Havana light would bear southwest by south to a point from which it would bear southwest by west and back again, covering five points of the compass (*fol.* 89), and to repeat that movement continuously during the 24 hours. The actual distance so traversed would be, of course, greater or less as the segment was greater or less according to her distance from Havana light, whether "*about* 6 or 8 miles," as stated by Evans (*fol.* 142), or "between 6 and 7 miles," as stated by Nickerson (*fol.* 147), or six miles, as put down on the tracing, and the record of her log as to the number of miles so run by her would be affected more or less by the unestimated force of "a big heavy set of current from the Gulf stream" described by Lieutenant Nickerson.

Then, in order to get at the *probable* position of the *Tecumseh* at 5.35 or at 6 o'clock, when she boarded the *New-*

*foundland*, the officer of the *Tecumseh*, who undertook to put down the latitude and longitude by "estimation" for the want of any "observation" made at or near that time, had to go back from 6 p. m. to "noontime" of that day and take the position which had been then taken, not by *observation of the sun*, but "by cross-bearings," and to calculate the *probable* number of miles traversed in passing to and fro within the segment of the circle, between the bearings above mentioned, added to the 4½ miles' run in going to the ship, in order to *approximately* estimate the degree of latitude and longitude which would *probably* represent the *Tecumseh's* position at 5.35 p. m., when she was said to have boarded the *Newfoundland*.

To make this calculation at all accurate it was essential that the actual courses and distances of the *Tecumseh* between noontime and 6 p. m., together with the proper allowance for current, should be known. No copy of the log of the *Tecumseh*, showing her courses and distances from noontime to 6 p. m., was produced, by which the accuracy of the calculation of the latitude and longitude at 5.35 o'clock, as *estimated* by Lieutenant Nickerson and as put down on Lieutenant Culver's "tracing" and afterwards on the chart, could be tested or proved. The copy of the log from 4 p. m. to 8 o'clock was put in evidence (*fol.* 144), and from it no record appears of the courses or distances of the ship. It must be assumed that the log from noontime until 4 o'clock was equally devoid of such record. It therefore appears that no data were kept from which even an "approximate estimation" of the latitude and longitude at 6 p. m. could have been made; certainly none were put in evidence by which the accuracy of those estimates could be tested by the court.

Thus, from a vague and uncertain starting point, varying, as "estimated," all the way from six to eight miles from Havana light, with no "observation" taken, with no log record to go by, and the *Tecumseh* traversing, between noontime

and 6 p. m., backwards and forwards between two points of the compass an uncertain number of times, going sometimes with and sometimes against "a big heavy set of current," with a varying rate of speed, and on her last run "going at full speed" on a northeast course across a current running east, with no record of the number of miles run by her between noontime and 5.35 p. m., the witnesses for the captors, on an indictment charging the *Newfoundland* with "loitering" between two assumed points on the ocean, undertook to fix, on the day after the capture, *by* "*estimation*," the exact latitude and longitude of "the point of departure" where she was boarded by the *Tecumseh;* and this *estimation* is set up before the court as *proof* to contradict the precise testimony of the master and crew and log and chart of the *Newfoundland*, showing the daily record of the positions and course of the *Newfoundland* put down by Captain Malcolm from actual observation and log reckonings, corrected from time to time by land bearings (*fols.* 160–170), the last sun observation having been taken by him at 4 p. m., two hours before meeting the *Tecumseh*, from which time and position to the time and place of meeting the *Newfoundland* was *proved* to have steamed, on a straight west course, an ascertained number of miles recorded by her log.

THE SAME UNCERTAINTY IS SHOWN AS TO THE TIME.

Lieutenant Evans, of the *Tecumseh*, said that the *time* when the *Newfoundland* was boarded was "*about*" 5 o'clock. This was taken from no note made by himself. He says (*fol.* 140):

"I remember it was *about* 5 o'clock, *because* as soon as we started after that vessel I went down below to get my dinner. I was *probably* down there 15 or 20 minutes, when it was reported to me that we were very near the vessel. * * * Q. You say, then, it was about 5 o'clock when you started in chase, and you were 25 minutes to half an hour before

boarding? A. I *should say* that was the time. Q. How long was she detained by you? A. I *should say* half an hour."

He also said (*fol.* 143) that the time was recorded in the official log of the ship. The extract of the log, however (*fol.* 144), reads thus:

"At *5.15* sighted stray steamer to the eastward; stood over to her. She proved to be the *Newfoundland*, of Montreal. From board bearing at 5.35 she proved to be bound from Halifax for Vera Cruz and Kingston, Jamaica, with general cargo. * * *"

It would seem, from this not very clear entry, that the ship was sighted at 5.15 and not at 5, as said by Lieutenant Evans. If it took "a half hour" to come up with her, it would bring it to 5.45 before the *Tecumseh* got "very near" the vessel, and about 6 o'clock, we may assume, before she was actually boarded. She was detained, according to Lieutenant Evans, "about half an hour," bringing the time to about 6.30 before she left the *Tecumseh*, which very nearly agrees with the testimony of the master (*fols.* 163–173), of the mate (*fols.* 203, 204), of the engineer (*fol.* 222), of the ship's log, and of the engineer's log, of the *Newfoundland*. The engineer's log showed (*fol.* 222) that by that ship's time the *Newfoundland's* engines stopped at 6.10 p. m., and that they were started again at 6.30 p. m. In the face of this evidence, the "tracing" of Lieutenant Culver and the testimony of Commander Mackenzie charge the *Newfoundland* with starting at 5.30 p. m., an error of about *one hour* in the calculation upon which the theory of "loitering" rests.

The evidence of Lieutenant Nickerson as to the *time* the *Tecumseh* started for the *Newfoundland* differs from Lieutenant Evans, but agrees with the log. He says (*fol.* 146):

"The vessel was sighted northward and eastward; at 5.15 we started chasing her."

He then becomes very positive, saying. "We boarded her at 5.35 exactly, returned on board our ship at 5 50, was absent from our ship a little better than 10 minutes, not more." He does not say that he took cotemporaneously any notes or kept any memorandum of those fractions of time to warrant his positiveness of statement. His recollections cannot stand alongside of *the proof* from the log of the engineer of the *Newfoundland*, which recorded cotemporaneously in the engine-room *exactly* when his engine stopped (at 6.10) and the instant when it again moved (at 6.30) (*fols.* 222, 223).

Commander Mackenzie was willing to allow one half hour for a possible difference between the time kept on the vessels (*fol.* 93). He said as to the tracing:

"Q. The first and final positions, are they correct?

"A. Yes; very nearly, judging from the position of the light, and the Morro was lighted that night. The principal point that governed me was *from half past five*, when boarded by the *Tecumseh*; they had it at six o'clock. Probably it was a difference of the time of the two vessels. From half past five till we saw her at half past eight she ought to have run 24 miles."

This idea rests on the assumption that the *Newfoundland* started at 5.30, whereas the record of the ship showed that her engines started at 6.30, and some allowance is to be made for her getting well under way after her engines actually began to move. Other testimony also corroborates the record of the *Newfoundland* as to the time she left the *Tecumseh*.

The sun set on the 19th of July at Havana, by the almanac, 6 hours and 37 minutes (*fol.* 178). All the witnesses agree that there was very little twilight.

Lieutenant Nickerson of the *Tecumseh* testified (*fol.* 148):

"Q. Did you see her after you left the *Tecumseh* (meaning the *Newfoundland*)?

"A. For, I suppose, about 10 minutes.

"Q. That is, she was only visible to you for that time?
"A. It began to settle down dusk then."

This showed that it was 6.30 p. m. or even later when the *Tecumseh* allowed the *Newfoundland* to start ahead, and not 5.35, as at first alleged by this officer.

The district judge in his opinion admits (*fol.* 247):

"I am not so clear as to the time, * * * but giving the ship the benefit of the reasonable doubt which the evidence warrants, assuming that she sailed at 6.30," &c. * * *

The purpose of this "tracing," prepared by Lieutenant Culver, by order of Commander Mackenzie, on July 20, the day *after* the capture, after consultation between the officers of the two blockading vessels, and made up of "approximate estimates" by those officers, was, as we have said, to sustain the *theory* of Commander Mackenzie, based upon the assumed position of the *Newfoundland* at 5.35 p. m. and her estimated and assumed position at 8.30 p. m. and the assumed rate of speed of the vessel going on a straight line between those assumed positions, from which hypotheses the inference was attempted to be drawn that the *Newfoundland* consumed more time in passing between those assumed points than ought to have been consumed, and from that inference the conclusion is attempted to be forced that she was "loitering" off Havana with the intention of breaking the blockade (*fol.* 93).

This word "loitering" was invented by Commander Mackenzie, and, like his word "chase," involves a prejudgment of the whole case against the *Newfoundland* and of the questions: *First.* "Was the assumed starting point or 'point of departure' accurately stated and was it proved as to the time and the place?" *Second.* "Was the assumed position at 8.20 or 8.30 correctly stated and proved?" *Third.* "Was the assumed rate of speed of the ship her normal rate or the actual rate of speed at which she had been previously

speeding?" *Fourth.* "Had she slackened that speed between 6.30 or 6.40 p. m. (when the *Tecumseh* lost sight of her, going 'on a course northward to westward'), and 8.20 p. m. (when she was supposed to have been sighted by the *Mayflower*)?" *Fifth.* "Assuming that she did slacken her speed between the assumed point of starting and the assumed position at 8.20 p. m., was it a necessary or reasonable inference from such supposed slackening of speed that she did so with the intention of making an attempt to enter the port of Havana?"

(1.) We have shown that the naval officers' location of the point of departure—that is, the position—of the *Newfoundland* when she met the *Tecumseh* rests on no solid basis of proof, is wholly uncertain, and is based on admittedly "approximate estimation," without the assurance of accuracy from "observation;" that it contradicts the record of the *Newfoundland*, and that the "point of departure" assumed by the district judge in his decree was not proved as alleged.

(2.) Was the Assumed Position of the Newfoundland at 8.20 Proved?

There is absolutely no *proof* to justify the location of the ship's position at 8.20 p. m. at the point assigned her on Lieutenant Culver's tracing. It all rests upon surmise and upon the assumption that "a faint light," which was seen by the officers of the *Mayflower* at 8.20 or 8.30 p. m., about north from Havana light, was the light of the *Newfoundland*.

This conclusion is based upon the assumption that because the *Mayflower* started towards *a* light at 8.20 p. m., seen about northeast from Havana, and because she came up with the *Newfoundland* at 10 p. m. at a point N. N. W. ½ W., about 17 or 19 miles from Havana light, that therefore the "faint light" seen at 8.20 must have been the light of the

*Newfoundland*, and could have been the light of no other vessel.

We submit that this is not *proof*, and is no proper warrant for the assertions of the officers of the *Mayflower* undertaking to locate the true position of the *Newfoundland* at that hour. There is not, and, from the nature of the case, there could not be, any *proof* coming from those officers of the actual position of the *Newfoundland* at that point of time or place.

It was night-time; it was dark; the vessel herself was not and could not be seen, nor was she nor could she be seen so as to be known by them to be the *Newfoundland* (*fol.* 107).

All the evidence on this point from the captors is mere surmise. "*About*" 8.20 p. m., the *Mayflower* being, as is assumed (not proved), "*about* six miles" north by east from Morro light (*fol.* 247) and on her cruising ground, in motion "at half speed," "heading east-northeast," a "faint light" was seen bearing *about* north by west from the *Mayflower*, and *estimated* to be *about* two or three miles distant (*fols.* 133, 244).

In his testimony, Commander Mackenzie stated that the blockading officers and crew were in the habit of seeing many vessels in that locality and of chasing them (*fol.* 116).

"As to chasing, we chase all the time—two or three newspaper tugs at night; spent over half a ton of coal chasing newspaper tugs, and we don't get anything."

There is nothing in proof to show that the "faint light," so discovered by Ensign Pratt from the *Mayflower*, may not have been the light from some "newspaper tug" or from some vessel other than the *Newfoundland*. Certainly there is no evidence upon which it can be averred, as proved, that the "faint light" so seen was in fact a light on the *Newfoundland*.

It is surmised, conjectured, assumed, merely "from sub-

sequent developments" (*fol.* 244) that it was the *Newfoundland's* light and none other.

These "subsequent developments" have been described in the testimony of the officers of the *Mayflower*, and in the "opinion" of the district judge, as a "*chase*," a word invented by Commander Mackenzie—a small one, indeed, but one of immense dramatic power in prejudging the whole case against the *Newfoundland*.

The word "chase" as used by the witnesses and by the district judge involves *these* assumptions, without proof, viz:

(*a.*) That the faint light so seen was the *Newfoundland*.

(*b.*) That though it appeared and was lost soon after, and though no light was visible for some length of time, whenever another light was seen anywhere upon the ocean, the second light was assumed to be necessarily the same as the first, and to belong to the *Newfoundland* and to no other possible ship or tug.

(*c.*) That though between 8.20 p. m. and 10.10 p. m. the *Mayflower* was frequently seeing lights, now off her starboard and now off her port bow, at various points of the compass, and though in the intervals she sometimes for a great length of time saw no lights at all, yet in every case it was assumed that the light that was seen was that of the *Newfoundland*, and of no other possible ship or tug.

(*d.*) That the *Newfoundland* was "the chase"—that is to say, the thing which was being chased, and which *knew* that she was being chased by the *Mayflower*—notwithstanding it was admitted by Commander Mackenzie that *at no time could the Newfoundland have seen the Mayflower*, as the latter carried no light, and did so intentionally, so as not to be seen (*fol.* 109).

Upon the bare fact, then, that at 8.20 p. m. "a faint light" was seen about north by west from the *Mayflower*, and

that she from her position, "about 6 miles" northeast from Havana light, steamed in the direction in which that light was seen, and that the *Mayflower*, after running an unascertained and unrecorded number of miles, frequently changing and altering her course between 8.20 and 10 p. m., at the latter hour came upon the *Newfoundland*, it was assumed that the "faint light" seen at 8.20 p. m. was the light of the *Newfoundland* and of no other ship.

It was also assumed that every light which was seen by the *Mayflower* during the hour and a half from 8.20 to 10.10 p. m. on the various courses run by her between her starting point, near Havana entrance, at 8.20, and the point when she came upon the *Newfoundland*, 19¼ or 21 miles N. N. W. ½ W. from Havana light, at 10 p. m., was always and necessarily the light of the *Newfoundland*, the ship herself not being seen until a few minutes before the seizure.

It was also assumed that in this so-called "chase" of the *Newfoundland* by the *Mayflower*, at every time that a light was seen and at every time when a light so seen disappeared, the *Newfoundland*, called "the chase," was changing her course, conscious of being pursued, and was turning and dodging about, in guilty consciousness, in order to escape her pursuer.

It was upon this assumption mainly that the *Newfoundland* was seized as "prize of war" (*fols.* 20, 41, 90, 96, 109).

And yet Commander Mackenzie, when he encountered Captain Malcolm, master of the *Newfoundland*, 21 miles N. N. W. from Havana light, so far from finding a man conscious of guilt, who had been knowingly running in a zigzag course, doubling and turning to escape a recognized pursuer, found him wholly unconscious of any pursuit, steaming on a straight course west (as all the witnesses on the ship and the ship's log and chart proved that she had been steering since 8 o'clock p. m.) (*fols.* 163, 203, 205, 215, 219, 245).

The boarding officer of the *Mayflower*, Lieutenant Culver,

who went on the deck of the *Newfoundland*, testified as follows (*fol.* 120):

"I said to the captain first thing, 'We have been chasing you a long time.' He said, 'That is strange; he hadn't seen us until we fired the gun.'"

Commander Mackenzie testified:

"I thought Captain Malcolm seemed to be perfectly straightforward, but rather contradictory." * * * (*Fol.* 92.)

Captain MALCOLM tells of his interview with Commander Mackenzie on board of the *Mayflower* when he was arrested:

"When I went on board the *Mayflower*, after being introduced to Captain Mackenzie, he told me he was going to send me in. I asked for (what). He invited me down in his cabin and he told me I had been changing my course. I told him I had not changed my course since 8 o'clock. He said, A very strange thing; he couldn't account for it, if I was not changing my course. He then asked me the speed of the ship, and I told him 8 knots, when he said, I don't believe you; we have been chasing you now for nearly two hours, and my ship is going all the way from 11 to 16 knots, and he said, 'It was not possible unless you are making more than 8 knots.' I told him he could not have been steering a straight course if he had been chasing us that time at that speed. He said it was very hard for him to believe; he should say the ship was nearer 18 than 8. I told him that was simply an impossibility" (*fol.* 176).

Cammander Mackenzie and his officers, assuming that every such successive light seen from the *Mayflower* between 8.20 and 10 o'clock p. m. was that of the *Newfoundland*, fell into the still greater error of also assuming that the vessel which they were pursuing was frequently changing her course, and doing so to escape capture, because, forsooth, the lights they saw appeared now on one side and then on the opposite side, now appearing and then disappearing; at one time disappearing for twenty and at another for thirty

minutes, and, as he put it, "only occasionally visible" (*fols.* 20, 90, 96, 109).

And *yet* Commander Mackenzie was forced, on cross-examination, to admit that, assuming that the "faint light" which he saw at 8.20 p. m. was the light of the *Newfoundland*, it was possible that *she* might all the while have been steering a straight course, while the *Mayflower*, "*the pursuer*," in following her, might have done all the changing of course that was done (*fols.* 110, 112):

"Q. I want to get from you really the statement of what your view of this matter will be, and I tell you frankly I want to get you to admit (that) the apparent changing of her course to you may have been an effect consistent with her going on an absolutely straight westerly course, while you followed first on one side and then on the other?

"A. I admit that maybe she didn't change her course; it is possible but not probable that we would overrun her course.

"Q. You were overrunning the light on the port side?

"A. We never saw her port light.

"Q. Suppose the companionway of a ship with an opening on the port and starboard sides, and a lantern hanging in the companionway, the light from which would be visible at certain points through each of these openings, she going now on a westerly course, and having passed a point two points abaft the beam, where you would lose the sight of the light, if you saw it before, it would not be possible for her in her position relative to your position to open to your vessel the lantern showing through the port opening of the companionway?

"A. Oh, yes; I have not seen the companionway. * * *

"Q. I am giving you a hypothetical case. Assuming there is a companionway and a lantern hanging in it, and there is on the port side an opening through which the light would be visible at a certain angle, and another on the starboard side, through which it would also be visible, and the vessel going west and you following the light—the light from the companionway—you would bear towards that light as it retired, and in doing that wouldn't it be possible for you to overrun that course, and open the light through the starboard side?

"A. Yes.

"Q. Assuming you got in that position you would change your course and bear down a little beyond where you saw that light; she going still west, it was possible for you to overrun that again and open the light on the port side; then you would bear down again on the direction you had last seen the port light to overtake it?

"A. Yes; that diagram will show; that is quite possible, but you cannot reconcile it with steering a west course.

"Q. I ask you if that, assuming she held a west course——

"A. Not with a west course, we pursuing her; as we pursued her, it might happen we would see the light first on one beam and then on another. It couldn't happen, she being 10 miles north of Morro and steering west and coming to 17½ miles on the bearings she had given there.

"Q. Leaving the Morro out—taking the vessel in mid-ocean, pursuing a straight course—a vessel seeing a light on her, found her due north, steering, as soon as she saw her, a northwesterly course, that vessel going on, concealing that light by going on, the moment it came two points abaft the beam, would you lose that light, if the light was on the port side of the companionway? Wouldn't it be possible to disclose that light on the starboard side?

"A. Yes; I have said that several times. If you will look at the diagram you will see that it will be possible.

"Q. I am going to ask Captain Mackenzie to testify that this losing and gaining of these lights is possible to happen with a vessel going a straight course in front of one pursuing.

"A. Yes; and I drew the thing out the next day when I had leisure, and I came to the conclusion that it was possible for her to be steering a straight course.

"Q. So instead of her doubling and turning, it was your vessel that was doubling and turning?

"A. Yes; I don't say it was, but it may have been so" (*fol.* 110, 112).

Now, the slip pasted on the log of the *Newfoundland* by Commander Mackenzie at the time of capture (*fol.* 20) states thus:

"The *Mayflower* then being about 8 miles north of Morro light, Havana, started in chase of a faint light to the northward which was only occasionally visible. The chase oc-

casionally changed course two or three times and was finally brought to about 10.30 p. m. about 17 miles north-northwest of the Morro." * * *

It was mainly, as we have said, upon the assumption that the "faint light" seen from the *Mayflower* at 8.20 p. m. was the *Newfoundland;* that the latter was conscious that she was pursued, and that conscious of guilt she had frequently changed her course, doubling and turning in the effort to escape, that the commander of the *Mayflower* took upon himself the responsibility of seizing the *Newfoundland* and of sending her in as prize of war.

The admissions of Commander Mackenzie, above quoted, show that this assumption was unfounded and unjustifiable, and yet the same assumption pervades the "opinion" of the district court throughout. The court said (*fol.* 243):

"Ensign Pratt of the *Mayflower* * * * testifies that about 8.20 he picked a small light bearing northwest from him; * * * shortly after heading for it, *the light* was lost, but standing on the same course about 20 minutes and putting on forced draught, *the light* was *picked up again* a little to the westward. Altering his course and heading north-northwest, *the light* shortly disappeared *again*. He gradually changed his course to the westward until he headed about northwest, standing on that course about 30 minutes, still not seeing *the light*, when about 9.10 he sighted *it again*, bearing southwest on his port beam and inshore; headed for *it again* and stood on until about 9.30 when *the light* was seen outshore of him on his starboard beam, and headed for *it* again, and *came up with her* at 10 o'clock. *From subsequent developments it is clear that the light thus described was that of a lantern hanging on the wall of the companionway in the after deck-house of the Newfoundland visible only when nearly abeam through the doors on either side.*" * * *

Again, says the decree:

"When *the light* was first seen the *Mayflower* was heading east-northeast and *the light* was bearing north by west from her, a point forward of the port beam and estimated two or

three miles distant. No *other* light was *seen on the Newfoundland* until she was overhauled. At that time all of the regulation lights were found to be burning brightly" (*fols.* 243, 244).

Again:

"Lieutenant Culver, navigating officer of the *Mayflower*, *describes the chase* substantially as above, and exhibits a tracing, made on July 20, showing the *estimated positions of the respective vessels* at the time when *the light* was first discovered, and at the time of the capture, *and the course sailed by each.*"

Again, says the decree:

"Commander Mackenzie, of the *Mayflower*, was the senior officer of the blockade off Havana. * * * He says that about 8.30 a faint light was reported about north by west of him, which he thought was a plain lantern. *He describes the chase* and *locates* the *positions* of *the two vessels* on the tracing prepared by Lieutenant Culver."

We submit that a judgment based upon such testimony is without evidence to support it; that a "tracing" based upon such assumptions and mere inference without proof was not evidence and should not have been considered by the district court, and that the theory, assumptions, and suspicions of Commander Mackenzie were not proof and were not evidence upon which a decree of condemnation can be supported.

(3.) Was the Assumed Rate of Speed of the "Newfoundland" Her Actual Rate?

In the theory of Commander Mackenzie, adopted by the district court decree, the assumed rate of speed of the *Newfoundland* was 8 miles per hour. It was *proved* by Captain Malcolm, from his ship's log and engineer's log and from his own record put down upon his chart (*fol.* 190), that her average rate of speed during her voyage was about 7½ miles,

and that in coming from Crooked Island through the old Bahama and Nicholas channels he had not exceeded an average of $7\frac{1}{3}$ miles per hour (*fol.* 169).

Against this proof no evidence whatever was offered to contradict it or to sustain the assumption upon which the theory of "loitering" rests.

On the other hand, the log of the *Newfoundland* and the record of Captain Malcolm showed the actual distance run, by the log through each day of the ship's course, as well as the courses and the successive positions of the *Newfoundland*, from actual sun or star observations corrected by land bearings, taken from time to time. From the position of the ship at 4 p. m. and at 6 p. m., and the course from 6.30 p. m., one point north of west until 8 and after 8 due west, the straight courses run by the *Newfoundland* at the proved average rate of her previous speed, $7\frac{1}{2}$ knots, brought the ship's position at 10.05 p. m. *exactly where* Captain Malcolm at that hour located her by observation of the dip of Havana light, viz., 21 miles north-northwest one-half west from that light.

That was the position given by him in his testimony *in preparatorio* before the question, made on the second hearing, was raised, and it coincided with the record of the ship's courses and distances and positions previously noted by him in his memorandum book and afterwards put down in his chart (*fol.* 190). His record of the ship's voyage enabled him also to give the average rate of speed at which the ship had actually run *prior* to meeting with the *Tecumseh*, and he proved that between 6.30 p. m., when the engineer's log and the ship's log and the master's record showed that he left the *Tecumseh*, he ran at the *same* rate of speed to 8 o'clock and to 8.30, and to 10.05 p. m., when he was stopped by the *Mayflower*, covering just the distance shown on her chart, viz., that from 6.30 to 10.05 p. m., going at a speed of about $7\frac{3}{4}$ knots an hour, he had traversed $27\frac{1}{2}$ miles (*fol.* 173).

"Q. Did you or not increase your speed between the time you met the *Tecumseh* and the time you were stopped by the *Mayflower?*

"A. No.

"Q. What speed was that, from your calculations subsequently made?

"A. It was 7 knots—nearly 7 knots—calculating the time we were stopped by the *Tecumseh*, 20 minutes, which would give her a speed of a little over 7½ knots on an average."

This average corresponded with the previous average rate of speed of the *Newfoundland* before she met the *Tecumseh*, as it is recorded on her log and on the master's chart (*fol.* 169).

"Q. What is your ordinary rate of speed? I don't mean on this particular voyage—the ordinary rate of speed on this ship?

"A. It has been since I have been on the ship 7 to 8 knots.

"Q. Then the average rate of speed at which you had been running before you met the *Mayflower?*

"A. I had been running about 7½.

"Q. From Crooked Island channel to the *Mayflower?*

"A. No; I didn't make that much.

"Q. Have you calculated the average you did make from your chart, locating her *per diem* course of the ship?

"A. About 7¼ knots average rate of speed maintained from Crooked Island channel until I met the *Mayflower.*

"Q. If you were to push the ship to or above 8 knots an hour what would be the natural effect?

"A. She would consume a lot more coal; it would be hard on the machinery, and when the ship was loaded it would only be safe to do that in the very smoothest of waters.

"Q. Were you very flush of coal at that time?

"A. No; the coal was getting short at that time.

"Q. Before that time had you given any instructions to the engineer with regard to your rate of speed?

"A. I had.

"Q. What were they?

"A. I told him to reduce the speed and save the coal.

"Q. How is your calculation made to the run of the ship in point of miles every 24 hours?

"A. Ordinarily get the distance from the log corrected by observations.

"Q. What kind of observations?

"A. Sun observations or star observations.

"Q. If you were in sight of land could you correct it in that way?

"A. Yes; correct it by land if in sight of the coast.

"Q. Which of those ways of ascertaining the position and course of the ship did you use in making your record upon those charts?

"A. I invariably used observations when I could get them—when the sun was not obscured. I would take the sight every morning at 8; I would take the meridian altitude at 12, and another chronometer sight about 4 in the afternoon, with occasionally a star or two at night.

"Q. And land observations in the day?

"A. When I was in sight of land I would take the bearings of the light-house or a well-known point of land to correct my position by."

(4.) Had the "Newfoundland" Slackened Her Speed Between 6.30 and 8.30 p. m.?

There is no testimony whatever produced on this point by the captors. The testimony of the master of the *Newfoundland* was that he maintained the previous average speed of his ship between the time, 6 30, when he left the *Tecumseh*, and 10.10 p. m., when he was captured by the *Mayflower*, and that he did not at any time increase his rate of speed, which, of course, he must have done to make up his average, if at any time he had slackened his speed in order to "loiter."

The engineer of the *Newfoundland* testified (*fol.* 221) as follows:

"Q. From the position of the engineer in a steamship, do you at any time know of your own knowledge, from the running of the engine, the actual speed the ship is making?

"A. No.

"Q. Does the record you keep in your office show?
"A. Merely the number of revolutions of the engine.
"Q. What is the fullest capacity in revolutions of the engine of that ship?
"A. The greatest number of revolutions per minute, light, 65.
"Q. What is the ordinary number of revolutions in running her, as you did, from Halifax to Havana, where you were captured?
"A. The greatest number of revolutions is 60.
"Q. What is the ordinary average number?
"A. 60."

* * * * * * *

At *folio* 222:

"Q. What is the hour, according to your record, at which the engine stopped on the evening of the 19th?
"A. By which steamer?
"Q. *Tecumseh*.
"A. 6.10.

* * * * * * *

"Q. How many revolutions had you been running before that?
"A. 56 during the fore part of the day; 58 from 4 to 8.
"Q. Give us the revolutions after you started again. At what time did you start?
"A. 6.30.
"Q. Give us the revolutions after you started.
"A. 58 up to the time we were stopped by the *Mayflower*, at 10."

* * * * * * *

At *folio* 228, on cross examination by the district attorney, he testified:

"Q. Was there any time between 6 o'clock and 10 o'clock—between the time the *Tecumseh* boarded you and the time when the *Mayflower* boarded you—when you lowered your speed?
"A. I think so.
"Q. Any time after you left at 6.30, if that was the hour, up to 10, when the *Mayflower* boarded you, when your speed was diminished?

"A. After 8 o'clock—I think between 8 and half past—speed was reduced two or three revolutions.

"Q. Was there any special occasion for doing that?

"A. No more than the saving of coal.

"Q. Were your instructions from the master or mate?

"A. No, on my own responsibility.

"Q. With that exception you steamed steadily ahead from the time the *Tecumseh* left you until the *Mayflower* captured you?

"A. Yes."

We submit that this evidence is conclusive as to the question of "loitering;" that it was *proved* that the *Newfoundland* did not slacken her customary speed between 6.30, when she left the *Tecumseh*, and 10.10 p. m., when she was stopped by the *Mayflower*, and therefore she did not "*loiter*" near Havana.

(5.) In the face of this clear proof that she maintained her customary average speed, it would be superfluous to argue the question whether, supposing that she did slacken her speed, it was a reasonable or necessary inference therefrom that she did so with the intention of entering the port of Havana.

We confidently maintain that if she had slackened her speed it would not be a necessary nor a reasonable inference from that fact, in absence of all proof of an "overt act" (such as attempting to enter the port, or the like), that she slackened her speed with the intention to enter Havana.

## Inaccuracies in the Testimony and in the "Tracing."

We have shown the uncertainties in the testimony of plaintiff as to the *place* attributed to the *Newfoundland*, by "approximate estimate," where she met the *Tecumseh* at 5.35 or 6 p. m., and also as to the *time* when those vessels met and parted. We have also shown that there is no re-

liable foundation for the assumption as to the position attributed to the *Newfoundland* at 8.20 or 8.30 p. m.

The position assigned to the *Mayflower* at 8.30 p. m. was stated by Commander Mackenzie (on the slip pasted on the log of the *Newfoundland* July 19) to be "*about* 8 miles *north* of Morro light" (*fol.* 20).

Lieutenant Culver, of the *Mayflower*, says (*fol.* 119):

"The time of starting the ship (the *Mayflower*) was *about* 7 *miles* from Morro light. * * * It bore *about* south by west half west, I think."

On the log of the *Mayflower* her position off Havana light, her starting point, is put down as 6 *miles* from Havana light and not "8 miles" or "7 miles" (*fol.* 239); and so it is in the statement of distances, which Commander Mackenzie, after the argument was closed, was allowed to put down on the chart of the *Newfoundland*, so that we have, to begin with, the three uncertain guesses of "*about* 8 *miles*," "*about* 7 *miles*," and "6 *miles*," all from the captor's witnesses, as to the position of their own ship.

Neither Commander Mackenzie nor Lieutenant Culver pretend that the positions noted down by them on the tracing and afterwards on the ship's chart were ascertained from actual observations. Lieutenant Pratt had taken no observation by which he could determine what the position of the *Mayflower* was at 8.20 or 8.30 p. m., July 19. He "had been told to take bow and beam bearings off the Morro;" had "started to take it, when he sighted the faint light, and *did not complete it*" (*fols.* 133, 134).

When he first "picked up the light" he "*judged*" the distance of the light from the *Mayflower* to be "2 miles, or *possibly* 3 miles" (*fol.* 130).

He was asked:

"Q. Have you any other data by which you could determine how far from the Morro you were when you saw this faint light?

"A. Yes, I took a bearing of the light as soon as I sighted the vessel, and 35 days' running on a blockade enables you to tell pretty well.

"Q. Your calculations from your habit of seeing, then, is not as good as the log?

"A. Not quite.

"Q. Was that observation, you took, bow and beam?

"A. I took a bearing, and *estimated in my own mind from previous experience.*"

## Erroneous Position Attributed to the "Newfoundland."

### *Her Position at Time of Capture.*

Captain Malcolm, master of the *Newfoundland*, testified that when the United States ship of war the *Mayflower*, on the night of 19th July, 1898, "fired the gun it was 5 minutes past ten on board our ship. It was 21 miles north-northwest half west from Havana light" (*Transcript, fol.* 40).

In his testimony on final hearing he stated that the distance from Havana light, at which he was captured, was "21 miles north northwest half west;" that he estimated that to be the distance at which his ship was, because, *first*, "from the course I have been steering that should have been the position of my ship," and, *second*, because "I took the bearing of Havana light when it was dipping, just before 10 o'clock" (*fol.* 166).

When asked how he made the calculation to satisfy himself that it was 21 miles he answered, "Havana light is a 21-mile light; it is visible 21 miles." When asked by what authority he said, "The Sailing Directions for the West India Islands, published by Norrie & Wilson, recognized all through England and the Dominion of Canada, as are all their diagrams and charts."

The witness read from the sailing directions:

* * * "It shows a fixed light, varied by flashes every half minute at 144 feet above the sea, and visible 21 miles."

After stating that 21 miles was the extreme distance according to the circle of illumination on the chart, he was asked, "How did you judge it to be the extreme distance?" He said, "I took the bearings of the light when it was dipping, going out of sight," and that was "the last moment at which I could see it on the bridge;" also that the bridge "is the highest point on the ship except from the masts, * * * 18 feet above the water level. That is the height of my eye when I am on the bridge" (*fol.* 167).

Against this precise testimony, from actual observation, no counter-testimony from observation is put forward by any witness for the captors, and yet the mere assumption, without observation, by Commander Mackenzie that the *Newfoundland* when captured was 17 miles N. N. W. ½ W. is given, in the "opinion" of the district judge, greater weight than the statement of Captain Malcolm from actual observation; and in the theory of the officers of the *Mayflower* and of the *Tecumseh*, which is adopted by the district court, as proof against the ship of the charge of "loitering" off the port of Havana, the distance of the *Newfoundland* when captured is assumed to be 17 and not 21 miles.

## Other Errors in "The Theory."

Taking the courses and time of the *Mayflower's* so-called "chase" of the *Newfoundland*, as noted in the extract from the *Mayflower's* log (*fol.* 235), and the rate of speed as testified to by her officers (*fol.* 129), viz., "at 8.20 p. m. engines rung at full speed, * * * after running twenty minutes put on forced draft 135 turns," or according to Commander Mackenzie (*fol.* 90): "We immediately steered for the light and rung up full steam and sent down for the boilers to be

at forced draught, and we got the ship going as fast as we could, and before we got there we were going at the rate of 16 miles." Taking this rate of speed and the courses and times from her log, it will be found that if the *Mayflower* started from a point "six miles from Havana light," those courses and the distances, run at that speed, would *not* bring the *Mayflower* to the point of capture, as stated by Commander Mackenzie, but would bring the *Mayflower* to a point 3½ miles to the southwest from the alleged point of capture (if the last course but one is taken to be 20 minutes) or 4½ miles off (if that course is taken to be 25 minutes).

Again, taking the same courses and time from the alleged point of capture, and running *back* on the courses to the point of starting, it will be found that the starting point of the *Tecumseh* would be ten miles away from Havana light instead of six miles, as stated on the "tracing."

No evidence has been attempted to dispute the truth or accuracy of the positions and courses of the *Newfoundland previous* to her meeting the *Tecumseh* at 6 o'clock. The course of the *Newfoundland*, steaming west, after noon and after she left the *Hudson*, and her position at 4 p. m., are laid down on the chart of the master, and are not disputed by any direct evidence.

The log of the *Newfoundland* was in possession of the United States attorney from July 19, 1898. The testimony of the master was taken *in preparatorio* on July 27. Between these dates and August 30 the Government procured the attendance and testimony of the officers of the *Mayflower* and of the officers of the *Tecumseh*. It could have obtained that of the officers of the *Hudson* and of the *Badger*. It must be assumed that if the position of the *Newfoundland*, as taken from her log and entered on the chart of Captain Malcolm when she met the *Hudson* (a little before noon) or when she left the *Badger*, could have been disputed, the evidence of the officers and crew of those vessels would have been produced. No such evidence was brought forward,

and therefore the course of the *Newfoundland*, as laid down by Captain Malcolm on his chart, and her position at 4 p. m., as proved by Captain Malcolm, must be accepted as both proved and not disputed.

The *theory* which places the *Newfoundland* within a circle at a point marked "A" on the "tracing," $10\frac{3}{4}$ miles from Morro light, involves the assumption that the *Newfoundland* between 4 p. m., where her undisputed record places her, and 6 p. m. had departed from her west course, 14 miles from the coast of Cuba (*fol.* 162), and had run on a southwest course, and then again west to a point five to eight miles from shore (*fol.* 148) and $10\frac{3}{4}$ miles from Morro, covering $18\frac{1}{2}$ miles in two hours against a heavy current from the eastward—that is, nearly two miles per hour beyond her average speed of $7\frac{1}{3}$ miles per hour, as recorded on her log, and $1\frac{1}{4}$ miles per hour *beyond her fullest speed capacity* "in the smoothest of waters" of eight knots per hour—a physical impossibility.

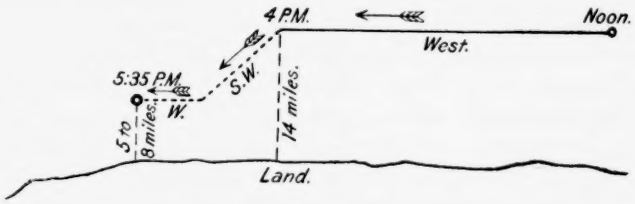
The whole distance she is thus charged to have run from her *noon* position, as proved, to the *Tecumseh's* position, as assumed, and from that point to the position attributed to her at 8.20 on the tracing, and from that position to the point of capture at 10 p. m., taking the shortest distances between each of those points, is $84\frac{1}{2}$ miles in 10 hours (less 20 minutes for the time stopped with the *Tecumseh*), or *over* $8\frac{1}{2}$ miles an hour, another impossibility.

### Further Tests of Errors in Lieutenant Culver's Tracing and in the Captors' Calculations of Time and Place from Noon to 5.35 p. m.

Distance from *noon* position of *Newfoundland* (ascertained by observation and recorded on her chart and log) to position of *Newfoundland* when she met the *Tecumseh*, at 5.35 p. m. (as stated by officers of *Tecumseh* and on Lieutenant Culver's sketch), is $58\frac{1}{2}$ miles in a straight line.

Taking 5.35 p. m., it makes her run from her proved noon position, if run in a straight line, 58½ miles in 5 hours and 35 minutes, equal to about 10¾ knots per hour against a strong current (see Lieutenant Nickerson), or 2¾ knots per hour *beyond* her highest recorded speed and 3⅛ miles *beyond* her actual speed between noon and 5.35 p. m. and *beyond* her average speed as recorded on the master's chart and on the engineer's log.

This calculation is based upon the assumption that the *Newfoundland* traveled from her position *at noon* to the position *attributed to her* by estimates of officers of *Tecumseh* in a straight line. They, however, found her going on a west course at 5.35 p. m. She was on a west course at noon off Cardenas 12 miles from land, and on a west course at 4 p. m. 16 miles from land (*chart of Captain Malcolm*). To have got off that course and upon another west course about "5 to 8 miles" from land at 5.35 p. m. (*fol.* 256), the *Newfoundland* must have run southwest for some distance and then west, and must then have gone, between noon and 5.35 p. m., on three lines, one west, one southwest, and then again west, thus:




In other words, she would *not* have gone on a straight line from her proved position at noon to her alleged position at 5.35 p. m., and the theory of plaintiff therefore makes her travel a *longer* course than 58½ miles from noon to 5.35 p. m. and *more* than 10¾ knots per hour—a wholly *impossible* rate of speed.

FROM 4 P. M. TO 5.35 P. M.

*Newfoundland's* position at 4 o'clock p. m. taken from observation and marked on chart by master at the time—16 miles from land (land receding to south of west at that part of the coast). (*See chart.*)

From that *proved* position at 4 p. m. to position assigned to *Newfoundland* by officers of *Tecumseh* at 5.35 p. m. is 26 miles, in a straight line.

Time consumed, 1 hour and 35 minutes; rate of travel, *16 knots* per hour, supposing she went in a straight line, and *over 16 knots* per hour if she went first on a *west*, then *southwest, and then west*, course—an impossibility.

FROM NOON TO 10 P. M.

Distance from *noon* position of *Newfoundland* to *Tecumseh's* position (as fixed by her officers at 5.35 p. m.), 58½ miles.

Distance from *Tecumseh's* position (as fixed by her officers) at 5.35 p. m. to the position (assigned to the *Newfoundland* by officers of the *Mayflower*) at 8.20 p. m. is 7½ miles.

Distance from *first* position (at 8.20 p. m.) assigned to *Newfoundland* by officers of *Mayflower* to *second* position assigned to supposed light of *Newfoundland* by Lieutenant Culver is four miles (supposing she was at first three miles off and not two miles off from the *Mayflower* off Havana light).

Distance from *second* position to *third* position assigned to *Newfoundland* is 5½ miles.

Distance from *third* to *fourth* position is four miles.

Distance from *fourth* to position of capture is five miles.

From noon to 10 p. m. her run is thus made to be $58\frac{1}{2}+7\frac{1}{2}+4+5\frac{1}{2}+4+5=84\frac{1}{2}$ miles in 10 hours, *less* half hour's detention by the *Tecumseh*, or in 9 hours 30 minutes equal to 8.89 miles per hour, or 1.49 miles *above* her average speed and $\frac{89}{100}$ of a mile beyond her highest known speed per hour, showing that, so far from "loitering" before Havana, she

must have *overrun* her utmost capacity of speed to have passed from her noon position *as proved* through the courses attributed to her by officers of the *Tecumseh* and of the *Mayflower* to the position assigned to her at 10 p. m. by officers of the *Mayflower*.

FROM 6 P. M. TO 10 P. M.

The distance which the theory of plaintiff's witnesses (adopted in the decree) makes the *Newfoundland* run from the point where she is said to have met the *Tecumseh* at, say, 6 p. m. is—

| | | | | | |
|---|---|---|---|---|---|
| 7½ | miles | from | 6 p. m. | to | 8.20 p. m. |
| 4 | " | " | 8.20 | " | 8.40 " |
| 5½ | " | " | 8.40 | " | 9.10 " |
| 4 | " | " | 9.10 | " | 9.30 " |
| 5 | " | " | 9.30 | " | 10 " |

Total run, 26 miles in 4 hours. Taking off 1 hour and 30 minutes, which she is *alleged* to have lost in "loitering," and she must have run the supposed 26 miles in 2 hours and 30 minutes and at a rate of 10.40 miles per hour, her average speed being only 7.33 and her fullest recorded speed being 8 miles; in other words, 2.40 miles per hour *above* her highest recorded speed and 3.07 miles per hour *above* her proved average speed.

It follows that the *Newfoundland* could not have "*loitered*," as is charged, and that the time assumed of her leaving the *Tecumseh* (5.35 p. m.), as well as the position assigned to her, must both be wrong.

The district judge erred in ignoring this evidence, which proved conclusively that the officers who made the "tracing" and who undertook to fix the positions of the *Newfoundland* were grievously mistaken.

The accompanying diagram shows by the plain *black* lines the course proved to have been run by the *Newfoundland* as recorded in her log and upon the chart of the master.

The courses attributed to the *Newfoundland* by the theory of Commander Mackenzie and of the "tracing" prepared by Lieutenant Culver are shown by *dotted* lines.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

It is submitted that the theory of the "tracing" and of Commander Mackenzie is thus shown to be at fault on all the points it assumes, and that it utterly fails to make out the case of excess of time consumed by the *Newfoundland* after she left the *Tecumseh* in passing the port of Havana.

### The Theory was an Afterthought.

This theory, broached by Commander Mackenzie at the second hearing, was, moreover, a clear afterthought—a thought which was not in his mind when he arrested the *Newfoundland* as prize of war. It only entered his mind on the day after the capture and after his communication with the officers of the *Tecumseh*, from whom he obtained the misleading "estimates" as to her position and as to the time when she parted from the *Newfoundland*.

It was not in his mind when he made the seizure and when he prepared the typewritten slip which he pasted on the log of the *Newfoundland*, giving his reasons for capturing her (*fol.* 20). The prominent idea *then* was that he had been "chasing" the *Newfoundland*, and that she had been running away from his pursuit; that she ("the chase") had "changed her course two or three times" before she was "finally brought to," and that she was "out of her shortest course for Jamaica or Vera Cruz." Nothing was then suggested about her "loitering," as he says himself (*fol.* 109), "No; I don't think I mentioned his lights or about his loitering;" and again, "No; I said a little, faint light, afterwards only occasionally visible. That had no reference to her running lights; nor were there any words about her loitering. I made up my mind that as soon as I saw the *Tecumseh* had boarded her that I would see the *Tecumseh* the next morning."

And the next morning he did "see the *Tecumseh*," with the result as shown above, viz., a condemnatory "tracing," prepared by his direction, based upon what now are shown

to be erroneous assumptions as to place, time, and rate of speed and involving an almost complete change of attitude as to the ground upon which the *Newfoundland* should be condemned, the idea upon which he arrested her, of her having frequently altered her course while being pursued by the *Mayflower*, and of her having run away from his 16 knot ship of war for "nearly two hours" at an impossible rate of speed, being abandoned, and the new theory of her having lost time between 5.30 and 8.20 becoming the sole charge of any "overt act" on the part of the *Newfoundland*.

In the above calculations of distances, the courses taken from the log of the *Mayflower* are the shortest possible distances between the points at which the officers of the *Mayflower* claim to have seen the light of the *Newfoundland;* in other words, giving the theory of the captors the benefit of the shortest possible distances run.

These figures show that the theory of the plaintiff's witnesses, as to the estimated positions and time of the *Newfoundland*, is wholly erroneous and the location of her positions wholly inaccurate, and the district judge erred in accepting their testimony as evidence, in adopting their theory as proof, and in allowing it to prevail over the contrary proof of the master of the ship, of his chart, and of the ship's log and the engineer's log.

It may be said that the *noon* position of the *Newfoundland* and her position at 4 o'clock, assumed in the above calculations, rest upon the testimony of the master.

If this were so, Captain Malcolm stands unimpeached by any evidence against his credibility or character.

But the proofs of the course and positions of the *Newfoundland* do not rest on the statement of the master alone. They were recorded on the official log of the ship up to the time of her meeting with the *Tecumseh*. No attempt has been made to dispute their correctness. That record has from

the moment of the capture been in the possession of the court. It fully corroborates the statements of the master.

Captain Malcolm's statements have also been borne out by testimony of other witnesses as to the ship's course, who also are unimpeached.

On the other hand, the fact that it has been clearly demonstrated above that the officers of the *Tecumseh* were wholly mistaken on the 20th July in their retroactive estimates as to the *time* they boarded the *Newfoundland* and the *time* she was allowed to proceed still further intensifies the uncertainty and unreliability of their "estimates" as to the *place* where she was stopped by the *Tecumseh*.

We submit it was error of law for the district court to have allowed such testimony to be introduced in evidence and to be considered by it as proof in the case.

Also that it was error to give to it weight to contradict and overcome the testimony of the ship's records, and the testimony of the officers and crew of the ship, unimpeached witnesses, as to facts regarding the course of the ship, which was exclusively within their knowledge.

## Point Four.

No Proof of Acts in this Case to Sustain Inference of Intent.

The district judge himself ruled as matter of law that—

"Condemnation cannot justly follow proof of facts from which mere mental intention can be inferred, unless there is also *proof of acts*, from which the presumption *necessarily* arises, that there is the beginning to put into execution the unlawful intent" (*fol.* 239).

Testing the evidence in the case by the rule, we look in vain for proof of a single act on the part of the *Newfoundland* from which "the presumption *necessarily arises*" that there was the beginning to put into execution the unlawful

intent to go into the port of Havana, which is the *intent* charged.

We fail to find any *act* from which such a presumption would *naturally* or *reasonably*, much less *necessarily*, arise.

Whatever may be imagined or suspected as to her previous intentions, the *Newfoundland*, when arrested by the *Mayflower*, was steaming westwardly at the rate of seven to eight knots per hour, and was 21 miles to the north-northwest half west from the port of Havana, having come from the eastward through the Old Bahama and Nicholas channels, having passed to the north of that port at a distance from it not less than 10 miles according to the captors and according to the testimony of the master as far as 17 or 17½ miles away from it. When going through those channels, which were passed at much less distances from the entrance of the other several Cuban ports, she had nevertheless passed several miles to the north of the cruising grounds of all the blockading fleet on the north coast of Cuba, had been "chased," stopped, examined, and released by three other blockading vessels, no one of whom had found her heading for any Cuban port, blockaded or not blockaded, every one of whom had found her pursuing her west or northwest course, and the last one of whom, after boarding her, at 6 or 6.30 of the same evening, at a point at least 10 miles north of Cuba and northeast of Morro light, had seen her at dusk steaming northward to westward away from the direction of and proximity to the port of Havana. When arrested at 10 p. m. by the captors she was found at a point 21 miles north-northwest one-half west from Havana on the continuation of her previous west course, with no proof of her having, at any time between 6.30 p. m. and 10 p. m., been seen to head for Havana or any other Cuban port.

What "proof of acts," then, is there from which could arise the presumption that there was, on the part of the *Newfoundland*, "the beginning to put into execution the unlawful intent" to enter the port of Havana?

## Did the Newfoundland "Approach Havana" After She Left the Tecumseh?

The district judge (*fol.* 255) says:

"It must be conceded that there is no proof of any attempt to enter the port of Havana—that is to say, no witness has testified to seeing her heading that way. It must also be admitted, that the testimony as to loitering falls very far short of the proof offered in the *Neutralitet*, the *Apollo*, the *Charlotte Christine*, the *Gute Erwartung*, the cases relied on by the Government."

Why, then, was she not immediately released?

The district court held:

"All of these cases arose before the days of steam power, but the principles upon which they rest, and which I hold to be sound principles, require their application to conditions now prevailing, when the use of steam power renders the eluding of blockades a far more facile undertaking, and I feel compelled to hold that the whole purpose of a blockade would be rendered nugatory, if a steam vessel is allowed after notice to approach in the night-time so near to a blockaded port as to be able to see signals from the shore and to watch for the opportunity of entering, if it should appear that the coast is clear or the vigilance of the belligerent cruisers is for the time relaxed. A ship so approaching lays herself under the unavoidable imputation of being engaged in an attempt to break the blockade and there is a necessary presumption of sinister motive, which must be rebutted by positive proof that her presence there is innocent; that she is there either for some necessity or in the course of a voyage which requires her to pass that way."

A glance at the map will show that a vessel passing from the Old Bahama through the Nicolas channel bound for Vera Cruz or for Kingston, Jamaica, round the west end of Cuba would be on her natural course if she passed even *within* 10 miles north of Havana going west. The *Newfoundland* therefore, after leaving the *Tecumseh*, sailing west

and passing Havana at or over 10 miles north of Havana, was "in the course of a voyage which required her to pass that way" in order to get into the gulf of Mexico by the shortest and best route from Nicolas channel to Vera Cruz or to Kingston. Had she gone further north than she did go she would have gone out of her natural course.

In the *Neutralitet*, 6 Ch. Rob., at p. 34, Sir William Scott said:

"If a ship comes into the Downs, which is the common passage and *highway* to the German ocean and to different parts of Europe, it would not be at all just to infer from the mere coming there that she is necessarily coming to a British port."

The fact that in passing at that distance from the entrance to Havana a ship might see signals from the shore is surely not reason enough to require her to deviate from her obvious and natural course or to expose her to suspicion. The suggestion would have some pertinency perhaps in this case if there had been any shadow of proof or suggestion that signals were made to her from shore or returned by her. As matter of fact there is no such evidence. No signals were ever made to her or by her. Nor had the *Newfoundland*, assuming that she passed no farther than 10 miles off, "*approached*" the blockaded port of Havana. Even if the incompetent and insufficient evidence of the officers of the *Tecumseh*, who by mere approximate estimations located the position of the *Newfoundland* at 5.35 p. m., where she had met the *Tecumseh*, assumed by them to be $10\frac{3}{4}$ miles northeast from Morro, is to be accepted without question, that same evidence shows the *Newfoundland* at dusk steaming off west by north from that place of meeting.

Now, let us suppose that the *Newfoundland* was at that point ($10\frac{3}{4}$ miles northeast from Morro and 5 or 8 miles from land) at 6 p. m., then, from that point, in order to reach the point where the officers of the *Mayflower* claimed to have

sighted the *Newfoundland* at 8.20, namely, 10 miles north of Havana, she must have sailed northwest, increasing her distance from Havana at every minute of her progress. Was that "approaching" Havana?

Again, when she steamed north-northwest from the place of meeting with the *Tecumseh*, the latter had shaped her course "leisurely" back on a southwest course "in the direction of Havana light," back to her "usual place," 6 miles from Havana light (from which place she had steamed at 5.15 p. m. to overhaul the *Newfoundland*), thus placing herself in position again near Havana entrance and on guard between that entrance and the *Newfoundland* or any other passing vessel. If, then, between dark, say 7 p. m. and 8.20 p. m., the *Newfoundland* had changed her course from a north-northwest or west to a southwest course, and attempted to approach Havana, she had palpable assurance that in doing so she must inevitably encounter the *Tecumseh* in her path between the point of departure and Havana entrance. She could not have approached Havana without meeting the *Tecumseh* again and very shortly. Is it to be imagined that however much she may have desired or intended to attempt to enter Havana, the *Newfoundland* would have incurred the risk of a second encounter on that same evening from an armed blockading vessel, or at any time within an hour and a half after having been stopped and boarded by such vessel?

Beyond that, the master of the *Newfoundland* had "asked the boarding officer of the *Tecumseh* if there were a number of blockading ships to the westward," and had been told that there were "30, or along there" (*fol.* 146). Is it to be imagined that he, being not more than 10¾ miles northeast from Havana light, as is pretended, with the *Tecumseh* between him and the entrance, and in face of the notice that there were thirty other armed blockaders to the westward of his position at 6 p. m., would have changed his course and have approached Havana between 7 and 8.20 o'clock,

or that he would have "loitered" at that time and in that vicinity "to watch for the opportunity of entering it"? Had he not been assured by an officer of the *Tecumseh* that the coast was not only *not* clear for such approach or entrance, but that it was profusely guarded? And as to the vigilance of cruisers being relaxed, had he not had enough experience to convince him of the unrelaxing and excessive vigilance of at least three such cruisers within the run from Neuvitas to the *Tecumseh*, each of whom had successively steamed miles outside of their several cruising grounds to overhaul his ship? Again, was he at any time "*cy pres*" to Havana; was he ever "*so near* as to be able to enter"? Was the *Newfoundland* at all within the principles of the *Neutralitet* and other cases cited and within the *cy pres* doctrine of prize courts?

The district judge says: "It must be admitted that the testimony as to loitering falls very far short of the proof offered in the *Neutralitet* and other cases cited by the Government, *but* that all of these cases were before the days of steam power;" and the view of the court was that the principles of those cases ought to be applied "to conditions now prevailing when the use of steam power renders eluding of blockades a far more facile undertaking," and therefore it seems to have been thought by him that the doctrine of approaching *cy pres* should now be changed as against steam vessels, and that the limit of "so near" should be indefinitely enlarged to cover the whole neighboring seas.

The district judge seems to have lost sight of other "conditions" now prevailing, viz., that if the use of steam renders it easier in point of time for a blockade-runner to approach and enter a port, the same use of steam gives to the blockading force an equal and a greater power of overtaking such blockade-runners and of intercepting and *preventing* such attempted entry.

In addition to this, as ships of war are now constructed with especial aim of securing great speed, on a question of

"equivalents" the relative gain from the use of steam preponderates decidedly on the side of the blockading force as against the blockade-runner (*The Olinde-Rodrigues, supra*).

Again, if blockade-running has developed in modern times as an art or as a profession, there has been a correspondingly greater attention paid by blockading powers to the effectiveness of blockades in the increased number, speed, and armament of blockading ships of war.

As matter of public history and of public fact, therefore, of which the court will take judicial cognizance, it cannot be truly said, as is stated in the decree of the district court, that "the use of steam power renders the eluding of a blockade a far more facile undertaking," an easier business than it was before the days of steam.

This suggestion of the decree, then, we submit, fails to furnish any ground for a change in the rule of *cy pres* approach to a blockaded port or for raising a presumption of sinister intent from the mere presence of a steam vessel at a distance of 10 miles or more from such a port and on a public highway on the ocean, there being no other fact proved by which she could be condemned.

We contend farther that the district court erred in its construction of the rule of *cy pres* approach and in the application of that rule to the facts of the present case.

### Cy Pres Approach.

"Every merchant vessel on the seas is rightfully considered as part of the territory of the country to which it belongs. The entry, therefore, into such vessel, being neutral, by a belligerent is an act of force and is *prima facie* a wrong, which can be justified only when done for some purpose allowed to form a justification by the law of nations. * * * The ocean is the sphere of the law of nations, and any merchant vessel is by that law under the protection of the laws of her own nation and may claim immunity unless in cases in which that law allows her to be entered or visited."

*Mr. Webster to Lord Ashburton, cited in Wheaton's Law of Nations*, pp. 737–739.

The exact limit of the line within which a vessel might be said to be within "blockade water" has not been, and probably cannot be, actually determined. It may be assumed to be certainly beyond the range of cannon shot from the shore. It could not, however, be extended beyond the limit which it was necessary for the blockading vessel or vessels to hold for the effectual blockade of a given port. The blockading vessels were bound to occupy such a position, near to the entrance of the blockaded port, as would enable them *effectually to prevent* blockade runners from slipping into such ports. The line of "blockade" or "forbidden water" could not then, constructively or otherwise, be extended further into the open sea, nor could the line of justifiable arrest be so extended (except only in the case of a vessel which had already and in the inception of her voyage placed herself in the category of an enemy by the act of avowedly sailing for a blockaded port or by the act of actually entering or coming out of such port).

In the case of the blockade of Havana and certain other ports in the island of Cuba in the late war with Spain, the limit of six miles from the entrance seems to have been adopted by the United States as the proper cruising ground or station for the blockading vessels in daytime; at night they could go closer in.

Within that limit of distance, six miles from the shore near the Havana entrance, may then for the purposes of this case be conceded to be "blockade water." Beyond that distance the waters of the Old Bahama channel and of Nicholas channel were the open sea, free to all neutral nations, "the sphere of the law of nations," as Mr. Webster has it, the use of which, with absolute immunity, by merchant vessels is guaranteed by that law.

Before a vessel by her mere proximity to a blockaded port can subject herself to well-grounded suspicion of intention to violate the blockade she must be found certainly within that line, either coming out from or heading for such

port, or, in the language of Sir William Scott, she must "*approach cy pres, close up to* the blockaded port, so as to be enabled to slip in without obstruction" (*The Neutralitet*, 6 Ch. Rob., p. 35), or, in the words of Bynkershoek, "which should be *found so near those ports as to show beyond a doubt that they intended to run into them.*"

This language is taken by Bynkershoek from the words of a decree of the States General, published in 1830, with the advice of the courts of admiralty and the ablest Dutch civilians, to regulate the blockade of the ports of Flanders in possession of Spain, the language of which decree is:

"Qu'ils sont, si pres, qu'il est *indubitable* qu'ils y veulent entrer."

*Wheaton's Law of Nations*, p. 140.

Now, the *Newfoundland* was found by her captors, according to their own estimate, between 17½ and 21 miles north-northwest half west from the port of Havana, heading west or northwest. Was this (in the words of Bynkershoek) being found "so near as to show beyond doubt that they intended to run in," or was it, in the language of Sir William Scott, approaching "*cy pres, close up to* the blockaded port as to be enabled to slip in"? The idea of slipping in from a point 17 or 21 miles off seems even in the case of a steam vessel to be almost absurd.

But she must not only be "close up" to the blockaded port, but so near "as to be enabled to slip in without obstruction." That could scarcely be predicated of the ability of the *Newfoundland*, she being at the outside only an 8-knot ship, less than speed capacity of many sailing ships, to get into a port with 30 or more warships of 10 to 16 knot capacity, guarding the entrance of Havana or in the vicinity.

Nor in the language of Bynkershoek was she "found so near" * * * as *to show beyond a doubt* that "she intended to run into" Havana. According to the rule, her proximity must have been such as to *show beyond a doubt*—

that is, to exclude any other inference but the one—that she intended to run into the port of Havana. Surely a proximity of 21 or 17 or even 10 miles off, heading away from a port, cannot be said to show such an intention "*beyond a doubt.*" Beyond a doubt certainly means that from her mere position no other intention than that of entering can be inferred.

In the case of *The Neutralitet*, the offending ship was found *anchored in the roads*, considered to be *in the port* of Ostend, the blockaded port.

She was "lying within a sand and within the protection of the batteries and in a place where ships of large burden are unlivered by lighters as the more commodious method of delivering their cargoes at Ostend."

Even upon so strong a state of facts, Sir William Scott *would not in that case* lay down the general rule, which he thought would be no unfair rule of evidence to hold as a presumption *de jure where a ship approaches cy pres close up to a* blockaded port, *so as to be enabled to slip in without obstruction*, that she goes there with an intention to break the blockade. He decided the case on the facts and held that it was not a prudent and natural course that the master should have gone *into the port* of Ostend to get a pilot, as he claimed, and to anchor there, as he did, *in the roads*, and he concluded *from the evidence* that he had not gone there with an honest intention, but that he must have gone there for no other purpose than "to import her cargo into Ostend." It was in that case (*The Neutralitet*) that Sir William Scott said, as quoted above:

"If a ship comes into the Downs which is the common passage and highway to the German ocean and to different parts of Europe, it would not be at all just to infer from her mere coming there that she is necessarily coming to a British port."

*So*, we say here, that if a ship comes into the Old Bahama or Nicolas channel, the common passage and highway from

the Atlantic ocean to the gulf of Mexico and different parts of the West Indies, Mexico, and South America, it would not be at all just to infer from the mere coming there that she is necessarily coming to a Spanish or blockaded port.

In the case of *The Charlotte Christine*, 6 Ch. Rob., 102, the master admitted that he had stood *within one mile* of the shore *after* he had perceived a pilot-boat to be coming out to him. * * * There was then no necessity for him to go in further, *yet he continued to approach the shore*, and after he had been hailed by the captors and *had refused to bring to* on the first notice, "and he *continued to approach and in defiance* of the captor's boat, since it appears that he did not bring to until a gun was fired at him."

In the case of *The Gute Erwartung*, 6 Ch. Rob., 182, the ship, with an asserted destination to Caen, was captured 20 miles from Havre. She had arrived off Cape Barfleur and had then stood off that coast till about two in the morning, when she *changed her course* and was steering, according to the master's evidence, "in a course *direct to Havre*, and with an intention of going in close under the land for the purpose of taking a pilot on board to carry him to Caen."

This circumstance, it was held, "placed her in construction of law in the same situation which the other vessel" (the *Charlotte Christine*) "had actually reached." In the former case the vessel had continued her course close under the batteries, and was cut out at some considerable risk and damage to the blockading vessel. "Here, then," said Sir William Scott, "we perceive the same intention and in the course of being pursued to the same illegal effect. * * * It is impossible that any blockade can be maintained if such a practice is allowed that a vessel under a destination to a port not interdicted shall be at liberty to pursue her course in such a manner as must draw the cruiser employed in that service under the range of the enemy's batteries. * * * I am of opinion that the master in this case had *declared an unlawful purpose* and was *employed in pursuing it to an un-*

*lawful act*, and *on that* the ship and cargo must be pronounced subject to condemnation."

There is no symptom of similarity between the facts of these cases and those of the *Newfoundland*, and her steering past the port of Havana under the circumstances on the natural course of a ship sailing out of the Old Bahama channel through the Nicolas channel into the gulf of Mexico, even if she had passed as near as 10 miles, would not place her "*cy pres*" to Havana entrance "as to enable her to slip in without obstruction" or "so near" as that it could be said that she must have *indubitably* intended to enter. Being 10 miles off or steaming past a port is not such proximity thereto as to be reconcilable with no other supposition than that "beyond a doubt" she *intended* to enter.

## Point Fifth.

### As to the Preponderance of Testimony.

It may be said that the proof above considered rests upon the testimony of the master of the *Newfoundland*. Suppose this were so. Upon what better testimony, we ask, could it rest? The courts of England and of this country have habitually regarded such testimony as worthy of all credit where it has not been impeached, and the principle is recognized that preference is given in all courts to the testimony of witnesses as to facts, which lie peculiarly within the knowledge and within the means of knowledge occurring in the course of their business, over supposition or conjecture of those whose business does not give them the means of knowing or bring them in actual contact with the facts as to which the proof is offered; and the prize courts of the most civilized nations give the preference to unimpeached evidence coming from the officers and crew of a captured neutral vessel.

No attempt was made in this case to impeach the credi-

bility of any of the witnesses for the defense by evidence as to character or otherwise.

The effort was made to diminish the force of the testimony of Capt. Frederick N. Malcolm, master of the *Newfoundland*, by the suggestion that he was sailing under a false destination. This suggestion is based upon the fact that the ship's manifest shows that his destination was Vera Cruz, Mexico, and Kingston, Jamaica, while in the testimony Captain Malcolm stated that he also had verbal instructions to go to Caybairien or Sagua la Grande, in Cuba, in case those ports were open.

The district judge in his opinion (*fol.* 252) says:

"While I cannot hold that separate clearances for Kingston and Vera Cruz were in themselves suspicious, it is a cause of great and just suspicion that her real and primary destination was to neither of these ports, as subsequent events proved."

*Sir William Scott*, in the case of *The Rising Sun* (2 C. Rob., 105), says:

"In this case * * * the destination is very inaccurately expressed, some of the papers describing it to have been to Charleston, others to Altaia, whereas the true destination was to Guernsey; *but as they are both neutral ports, I do not think there is much in that*, more especially as it is the general practice not to allow a vessel to clear out for an enemy's port."

In our own case of *The Watchful* (6 Wall., 93) "the vessel cleared for Hamburg, when her destination was certainly Matamoras (Mexico) * * * her clearance was probably altered after she was at sea by writing over the word 'Hamburg' the word 'Matamoras' * * * a false manifest was used, and the fact of the main cargo of 252 cases of arms was carefully concealed from the officers of the customs at New York, from which port she sailed;" and yet the court

held: "It is very clear that there is no case of prize made out by the evidence * * * libel was properly dismissed."

Captain Malcolm, in his testimony taken *in preparatorio*, had frankly stated that at Halifax, Nova Scotia, he was ordered to clear his ship for the ports of Vera Cruz and Kingston, but that verbal instructions were also given to him before sailing from Halifax to proceed to the island of Cuba and to land his cargo at either the port of Caybarien or the port of Sagua la Grande, in case he, on arriving there, should find that those ports were not blockaded, but that on no account was he to attempt to enter either of those ports in case he should find that they were blockaded. He was not to attempt to enter any blockaded port, and that in case he found those ports blockaded he was to proceed to Kingston, Jamaica, and cable the owners for instructions (*fol.* 45).

At the time this testimony was given there was no reason (not even the duty of entire frankness) why Captain Malcolm should have said anything to the prize commissioners about Caybairien or Sagua la Grande or about the verbal instructions to go to those ports if they were not blockaded. He had been told by the officers of the *Badger*, off Neuvitas, that the whole island of Cuba was blockaded. He had thereupon abandoned all idea of going into either of those ports (*fol.* 188). He had steamed past those ports on the idea that he ought to pass them in order to satisfy his owners and charterers. In passing them he had seen no blockading vessel at or near the entrance. Nevertheless he had not stopped or made any attempt to enter into either of them. After passing them he had continued his course westward, intending to go to Kingston, Jamaica, on a course which was the natural course from a point off Sagua la Grande to Vera Cruz or to Kingston.

If he had said to the prize commissioners nothing about his verbal instructions or about Caybairien or Sagua, no one would have been any the wiser or have known that he

had had provisional instructions for those ports, or that he had even contemplated going into them.

His perfect candor, instead of working in his favor as a witness, has been used as the basis of an argument of suspicion as to the real intent of his voyage and of his intending to violate the blockade; and yet he might, within the bounds of perfect candor, have well dismissed the matter of his instructions as to Caybairien and Sagua as a thing of the past and as a matter of no importance to be mentioned and have omitted the instructions entirely in his testimony. He says in his testimony that after he had been told by Lieutenant Titus, of the *Badger*, that the whole island of Cuba was blockaded he had considered his instructions as to those ports canceled so far as attempting to enter either of them went (*fol.* 183).

It is also said that he "concealed" his verbal instructions from Lieutenant Titus, of the United States ship *Badger*.

If he had in fact concealed those instructions, such concealment was not calculated to deceive, nor did his silence on the subject operate any deception or influence any one's action. It certainly did not affect the action of Lieutenant Titus or of any blockading vessel.

"Concealment must be shown to have been a *fraudulent* suppression."

*The Anna Catharina*, 4 Ch. Rob., 88 (London ed., 107).
See also *The Rising Sun* (2 Ch. Rob., 105).
*The Watchful* (6 Wall., 93).
*The Pizarro* (2 Wheaton, 91).
2 *Pothier Ev.*, 337.
*Best on Ev.*, 414.
2 *Wharton's Law of Ev.*, § 1267, p. 398.

Nor did his silence as to the verbal instructions secure to himself any advantage whatsoever. After having been told that the whole island of Cuba was blockaded, there was then no reason or requirement of duty or good faith for him to say to Lieutenant Titus: "I had instructions to go into

those ports in case they were not blockaded." It would have been a superfluous and meaningless piece of information for him to give to Lieutenant Titus; but, in point of fact, he was not guilty of any concealment and there was nothing which would make his silence fairly construable as an intended concealment. When stopped and boarded by the *Badger* his ship's papers were called for and examined. He inquired of the boarding officer, Lieutenant Titus, as to the blockade and was told that the whole coast was blockaded. The statement of Lieutenant Titus, it appears now, was untrue in point of fact, but it was nevertheless accepted by Captain Malcolm at the time, notwithstanding it contradicted the information as to the blockaded and open ports of Cuba which had been given to him in Halifax (*fol.* 55), and it determined him *not* to go into Caybairien or Sagua. Having, on his entry into the Old Bahama channel, encountered first the threatening approach of a United States war vessel bearing down upon his ship, running ahead of him, then circling around him and dropping its search light upon him, then standing off a little way and firing a gun to stop him, and then boarding him and examining his papers (*fol.* 155), he might well have felt startled, and, being under peremptory orders not to get his ship in trouble, it was most natural for him to experience some distraction of mind and considerable uncertainty as to what he should do (whether to turn back on his course and go to the eastward or to continue on his previous course westward). In this condition of affairs he asked the boarding officer if he could safely go westward, and was told that it would be perfectly safe to do so (*fol.* 181).

On cross-examination by the district attorney he testified:

"Q. And when you were boarded by these U. S. ships you were asked where you were going?

"A. I was.

"Q. Did you tell them your real destination was a Cuban port?

"A. I did not.

"Q. What was your object in deceiving these officers from the U. S. vessels?

"A. I did not do it with the intention to deceive; under the circumstances, my destination was *not* a Cuban port.

"Q. But you have sworn positively the real destination was a Cuban port?

"A. *If those ports were open.*"

At *folio* 182, he answered:

"Q. Was it your judgment—you were told of this off Neuvitas—that you couldn't make either of these ports that you were bound for? Is it not several hundred miles nearer to Kingston around Cape Maysi from the point off Neuvitas than it is to go around the way you were heading?

"A. It is undoubtedly, but I was going when I met the *Badger* on the west course. If, after the *Badger* left me, I had turned round and gone in an easterly course, I considered I would be submitting myself to unnecessary suspicion.

"Q. Otherwise it would expose your secret instructions to the officers of the *Badger?*

"A. No; I did not say that, and I don't mean that. I meant what I said. To meet a warship going on a course, and, after meeting it, to turn round and take another would be a matter of suspicion.

"Q. Would it have been a matter of suspicion to tell the instructions when you found out about those ports and to turn round?

"A. I don't know. A person placed in the position I was perhaps don't always do what he would do afterwards. I had another reason. I wished to pass those ports, although I felt they were blockaded. I wished to satisfy the owners. There is a clause in the charter-party which says the master is liable to be dismissed by the charterers if he does not satisfy the charterers. I wanted to satisfy my charterers that those ports were blockaded.

"Q. You never did tell any of these officers who boarded you that you had any other destination than that mentioned in the ship's papers?

"A. I did not, for after I passed the *Badger* I *had no other destination* except what was mentioned in the ship's papers.

I considered that my instructions were cancelled in regard to those ports when the *Badger* told me they were blockaded, and I acted accordingly.

"Q. Then you desire to change what you said a few minutes ago, that you wanted further evidence than what they gave, and that you went on past those ports to see?

"A. I said I wanted to satisfy my charterers, although I was perfectly satisfied in my own mind, but by passing those ports on the log that would be evidence to satisfy them. I didn't want further evidence for myself.

* * * * * * *

"Q. You were going to Kingston; that was your destination; where you were instructed to go?

"A. From the way things turned out, Kingston was my real destination. Had I turned around after I passed Sagua I would have been as bad in that shape as before. I would have had to go east."

The court will be able to judge for itself whether Captain Malcolm's testimony bears the internal marks of truth and honesty, or whether it is shaken by the suggestion of suspicion, based solely on the fact that, when told by Lieutenant Titus, of the *Badger*, that the whole coast of Cuba was blockaded, he did not then and there *instantly* make up his mind as to his proper course, and did not then and there *instantly* decide to turn back from his previous west course and go eastward by the shortest course from that point to the island of Jamaica.

The court will bear in mind that his instructions were to "enter either the port of Sagua la Grande or Caybairien and there deliver the cargo to the order of the shippers. If those ports were blockaded I was not to enter or to attempt to enter, but I was to proceed to Kingston, Jamaica" (*fol.* 151).

Also that those ports were *not* blockaded then or at any time during the war with Spain. It is declared in the decree of the district court (*fol.* 252) also that Captain Malcolm had sailed from Halifax upon the assurance that those ports were open.

"Before sailing I asked Musgrave and Company to give me a list of the blockaded ports of the island of Cuba. This is what he gave me." * * * Map annexed, Ex. A (*fol.* 55).

The incorrect statement of Lieutenant Titus that the whole island of Cuba was blockaded contradicted the information under which Captain Malcolm had sailed from Halifax. The notice was calculated to surprise him and to embarrass him as to his proper course under his instructions. It added to the natural surprise and embarrassment of his unexpected arrest while on his way to the open ports of Caybairien or Sagua. He was entitled, in reason and fairness, to have time to deliberate as to his proper course under the notice of Lieutenant Titus. In this natural state of embarrassment it is asking too much of him that he should *instantly* have decided to go to Kingston, and to go there by the *shortest* route, and that, too, in the face of the fact that it involved his turning round from his west course on which he was steaming previous to his being stopped and his going back to the eastward, *especially* when he felt that he would thereby subject himself to suspicion, and when he had the idea remaining still on his mind from his instructions that he ought to go past Caybairien and Sagua "to satisfy his owners and charterers."

Furthermore, the master of the *Newfoundland* was compelled to act under difficulties in which he was unfairly placed by the false notice of the *Badger*.

### Effect of a False Notice by a Blockader.

In the case of *The Hendrick and Maria*, 1 Ch. Rob., p. 124, the vessel was taken on a voyage from Norway to Amsterdam. The master had been "warned not to go to any Dutch port," but had declared "he must proceed according to his bill of lading." The notice of blockade of all Dutch ports at that time was not true. *Sir William Scott* said:

"The notice is, I think, in point of authority illegal; at the time it was given there was no blockade which extended to all Dutch ports. A declaration of blockade is a high act of sovereignty and a commander of a king's ship is not to extend it. * * * The notice is also I think as illegal *in effect*, as in authority; it cannot be said that such a notice though bad for other ports is good for Amsterdam. *It takes from the neutral all power of election as to what other port of Holland he should go, when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral to this kind of distress* and I am of opinion, that if the neutral had contravened the notice he would not have been subject to condemnation. * * * I think the conversation of this man was not an expression of final intention; but that of a man *deliberating under difficulties, in which he was unfairly placed.* The master said 'he could not answer it to his owners to go to any place but Holland.' The commander does not point out to him any ports of Holland to which he might go; but tells him he might go to Bremen, Hamburg, or England. * * * I think the notice was erroneous and besides not broken; and therefore I restore this ship."

Captain Malcolm in his distress asked the boarding officer, Lieutenant Titus, "if there was any danger in going west. He told me no; that there was no danger whatsoever * * *" (*fol.* 156). He therefore continued his west course. He seems to have felt impelled to go past Caybairien and Sagua to satisfy his owners, under the same sort of idea which impelled the master of *The Hendrick and Maria*, who, being under instructions to go to Amsterdam, when told not to go to any Dutch ports, said "he could not answer it to the owners if he went to any place but Holland." So Captain Malcolm, having instructions to go to Caybairien or Sagua, felt that he could not answer it to his owners and charterers if he did not at least go past those ports. Having done this and in the meantime, after leaving the *Badger*, and having *finally* settled in his own mind that he would go to Kingston, he continued his course westward as the only

*safe* course for him to follow. Having started again, the farther westward he went, the more suspicious and unsafe, in his conception, would it have been for him to turn back and go eastward. It does not seem to us to be at all difficult to comprehend his action in the dilemma in which he was placed by the false notice and to reconcile it with his absolute truth and good faith. It certainly is not warrant for discrediting his testimony or for the conclusions reached in the decree of the district court (*fol.* 254), namely, that, in spite of his oath to the contrary, Captain Malcolm never had had instructions to go to Caybairien or Sagua or for the suspicion that he had secret instructions to go into Havana. Captain Malcolm's testimony has on every other point been fully corroborated, and we contend that he stands before the court not only an unimpeached witness, but one entitled to the highest credit.

## The Entry by Mate Salkus on the Log of the "Newfoundland."

Much has been made in argument and in the decree of the district court (*fols.* 245–248) and in testimony (*fol.* 103) of the entry made by the mate, Salkus, on the ship's log kept by him, viz., "8.30 Havana light, south 10 miles," as contradicting Captain Malcolm's calculation and statement that when he passed Havana light at 8.30 the *Newfoundland* was 17½ miles to the north of Havana, and as corroborating the "approximate estimates" of the position of the "faint light" sighted at 8.20 by the officer of the *Mayflower*, and as an *estoppel* upon the *Newfoundland*.

The mate, Salkus, in his testimony swore that he made this entry without having taken any observation or bearing (*fol.* 202):

"Q. In that log you have stated that in passing Havana entrance you were 10 miles off shore?

"A. Yes.

"Q. How did you arrive at 10 miles?

"A. We didn't get no 4-point bearings of the light before; we didn't see the light until a point before the beam; too far off. I just took a rough calculation and gave the ship the benefit of the doubt. We didn't have no correct bearings, and it is safer to give the ship the benefit of the doubt.

"Q. You made no calculation?

"A. No; guessed at it in going below.

"Q. And you put it down, giving the ship the benefit of the doubt?

"A. Yes. We didn't take any correct bearings.

"Q. Why did you think it was more than 10 miles off?

"A. By the distance the light showed. When we saw the light it was a point before the beam, bearing west by south."

On cross-examination he said (*fols.* 208, 209):

"Q. You kept the official log of the ship?

"A. I did.

"Q. Didn't you put in there the best knowledge you had of your position whenever you recorded it?

"A. Yes; if we had proper bearings of the lights. 4-point bearings or cross-bearings would be the proper position.

"Q. Now, here you have your entry 8.30, Havana light being south 10 miles.

"A. Yes. We didn't have no bearing of the light.

"Q. You now say 16 or 17 miles?

"A. About that.

"Q. Didn't you at the time you made this entry put down the best knowledge of your position you had then?

"A. No. I knew the ship was further off, and as we had no point bearings I put down less than the actual distance was.

"Q. Why didn't you put it down the best you knew?

"A. As I considered at 10 miles the land was a long way off, without having any bearings * * *

"Q. Didn't it occur to you by putting your distance here on your chart nearer to shore than you actually were that you were endangering yourself by showing you hadn't obeyed instructions?

"A. No; I didn't, because any vessel coming along the coast would know we were further off at the time as well as we did.

* * * * * * *

"Q. You spoke about giving the ship the benefit of the doubt. What do you mean?

"A. Giving the ship the benefit of the doubt means letting the ship have the benefit, if any, of the distance off shore—that is, the soundings. Where they lost a ship they said, Why didn't the captain give the ship the benefit of the doubt? If he had given the ship the benefit of the doubt and run in deep water, he would not have lost his ship. It was one of the best boats the Allens lost by not giving the ship the benefit of the doubt."

It is apparent from his language that Mate Salkus is not a learned man. Taking this in view, it is easy to see that his theory of proper navigation in running along a coast is that where he has no four-point bearings to calculate the distance from the shore the safe thing to do is to put down the distance at the lowest possible figures, so that those who succeeded him at the helm would direct the course of the ship no nearer to the shore, but, on the contrary, would allow for a possible doubt by steering outside of the limit so put down. "Giving the ship the benefit of the doubt" in saying "ten miles" from shore, in his view, then, seems to be the equivalent of saying "not less than ten miles."

Whatever may be thought of the intelligence of this witness or of the clearness of his explanations, it is certainly shown that the "10 miles" recorded by him was not put down or pretended to be put down by him from any "observations" or "four-point bearings" or other accurate calculations, but was an offhand guess, and when put down by him was not intended to mean that the ship was no farther off than 10 miles, but the contrary, viz., that she was not less than 10 miles from Havana light. We submit that the entry on the log by Mate Salkus was open to explanation by him and by the ship's other record, and that being explained, the entry is not, as has been contended by the captors, irrevocably binding as an *estoppel* upon the ship.

It is a statement so made by the mate, subject to correc-

tion by the calculations of the ship's position, as ascertained by the master from observation and recorded by him on his memorandum book and on his chart (*fol.* 190).

As to the mate's entry in the log, viz., "Havana light being south 10 miles," the district judge held as follows (*fol.* 238):

"It is not necessary to discuss nor to decide, now, how far a ship is concluded by entries in her log. If the party making such entry is shown to have been drunk at the time or habitually careless, or if made in a perfunctory way without observations or the opportunity of observations, little weight is to be given it; but the log being intended to be a correct record of the facts contained therein an entry made with full knowledge and opportunity of ascertaining the truth must be accepted as the truth if it tells against the party making it, and can be denied no more than a deed."

We submit that the district court erred in this ruling. The mate, Salkus, as shown above, expressly says that when he made that entry he had *not* "full knowledge" or "opportunity of ascertaining the truth" as to the exact distance of the ship from Havana light at 8.30 p. m. (*fols.* 202–209); *also* that he had made no calculation; had merely "guessed at it in going below" (*fol.* 202); also that "we didn't take any correct bearings," and that he made the entry 10 miles to "give the ship the benefit of the doubt," believing, "by the distance the light showed," that it was *more* than 10 miles off—that is to say, to be on the safe side, he put it 10 miles.

The entry in no way in this litigation "tells against the party making it"—that is to say, against the mate, Salkus—he having no interest in the matter, and we submit it is error of law to say that "it must be accepted as the truth" against the owners of the ship and cargo, who did not make it; that it cannot be allowed in their behalf to be explained by the mate, who did make it, or that it cannot

be corrected by the first and best evidence as to the ship's true position, viz., the chart on which are recorded the previous positions and course of the ship from regular observations by the master; and it was error to hold that the offhand guess of the mate, made *without* "observation" or "four-point bearings" or calculations, cannot "be denied no more than a deed."

We also contend that it is not necessary for the owners of ship and cargo to show that the mate "was drunk or habitually careless," in order to relieve them from the "*estoppel*" attributed to the mate's entry. His explanation is amply sufficient to do away with the whole force of the entry as a statement by himself and as by an admission by the ship. The positive proof by the master correcting the error of the mate is "conclusive evidence of the mistake" and establishes beyond a reasonable doubt the fact that the *Newfoundland* was at 8.30 at a distance north of Havana light of 17½ miles, and not 10 miles.

## Positive and Precise Testimony as Against Speculations of Witnesses.

Four unimpeached witnesses testify that the *Newfoundland* sailed from 8 p. m. on the 19th July a due west course—the master (*fols.* 51, 53, 56, 152, 157, 158, 159, 161, 162, 163, 166, 168, 173); the mate (*fols.* 65, 203, 205, 207, 208); the second mate (*fols.* 215, 216), and Levi Blackmore, sailor at the wheel (*fol.* 219). The actual speed of the ship throughout the voyage is testified to by the chief engineer, who kept the record in the engine-room of the number of revolutions of the engines, and the time is also kept on his record or engineer's log taken from a clock in the engine-room (*fol.* 221). This engineer's log corroborates the log of the ship throughout the voyage, and also corroborates the statements of the master (Captain Malcolm) taken down by him

on his chart from his observations and made by him on the stand, as also those of the mate and other officers.

Taking the whole testimony of these witnesses together, the course of the *Newfoundland* and the positions as shown on the chart of Captain Malcolm establish beyond question that the ship was at 6 p. m. 14 miles off shore, steering in a westward course; that she then and there encountered the United States ship of war *Tecumseh;* that at 6.30 she left the *Tecumseh* and started on a course one point north of west, upon which course she proceeded until 8 o'clock, when she was again put on her west course, which she followed until 10.10, when she was captured by the *Mayflower* 21 miles north-northwest half west from Havana light.

*Also* that during that time she was constantly moving at an average speed of about 7½ knots an hour, at which average speed she had been previously steaming on her course through the Old Bahama channel; that she did not alter her course except the change of one point north of west at 6.30 p. m., and again to west at 8 p. m.; that she did not between 6.30 and 10 p. m. stop or materially slacken her speed; that in the three hours and a half—from 6.30 to 10—she traversed 27½ miles (*fol.* 173), at an average rate of speed of about 7½ knots. This distance she could not have accomplished with the same number of recorded revolutions of her engine if she had deviated from her northwest course, after leaving the *Tecumseh*, when last seen by the witnesses of the captors at dusk, and had run towards Havana light on a southwest course, bringing her within 5 or 8 miles of the shore, and thence northwest to the point of capture, and that she could not have reached this point of capture in the 3½ hours if she had so deviated, even if she had run on straight lines and gone the shortest distance between those points.

It will be noted that the record of the ship's course before and after meeting the United States cruisers is from testimony of witnesses as to facts exclusively within their own

knowledge and from means of information occurring in the course of their actual daily business—facts, most of which are found recorded on the captured ship's papers, which papers were taken on board of her at 10.10 p. m. July 19 and sealed up by the prize officers, and only opened when brought before the prize commissioners and the court—most of which facts are testified to in the examinations of each of above witnesses from the *Newfoundland* taken separately and apart *in preparatorio*, and all of which facts are again testified to on examination and cross-examination on the final hearing.

It will be seen that no contradiction as to the main facts in respect to any one of said witnesses nor variance from the records of the ship's course and progress has been or can be shown.

Now, as against this unimpeached testimony which shows conclusively that the *Newfoundland* could not have "loitered" on her course between 6.30 and 8.20 p. m., and that she did not approach Havana or "loiter" off that port on the night of July 19, the suggestions, inferences, and "*approximate estimates*" of the officers of the two blockading vessels as to positions, time, or rate of speed were allowed to be set up and were accepted by the district judge as *preponderating proof*.

### Superior Education and the Like.

The district judge, following the lead of the captors' suggestions and suspicions, and adopting the approximate estimates of the officers of the two United States naval vessels, finds, between the positive and precise recorded testimony of the ship and that of the witnesses for the captors, what he calls "a marked discrepancy" (*fol.* 246), and there being, in his opinion, such discrepancy, he held thus:

* * * "The first point to be decided is which is correct. Applying the usual tests by which testimony is weighed

the intelligence of the witnesses, their opportunities for knowing the truth, the likelihood of error arising from considerations of interest, and other influences which commonly sway men's minds—there can be no doubt that there is a preponderance of probability in favor of that side, which having no interest in the controversy, has the greater opportunity of knowledge.

"Lieut. Evans and his mate were on cruising grounds with which they were familiar. There could be no difficulty in ascertaining their position from the bearing of Morro, which was in plain sight day and night. They were within 3 or 4 miles of the shore with well-defined objects from which bearings could be had. It was their manifest duty to know where they were, for they had to keep within certain prescribed limits. They are men of education, character and intelligence and their testimony cannot be discredited without imputing to them a reckless carelessness for which there is no warrant.

"Neither Captain Malcolm nor his mate were familiar with the locality; the former had once before been to Havana, the latter, never. Their interest is obvious—I have no difficulty in coming to the conclusion that the preponderance of evidence fixes the position of the *Newfoundland* within the described circle when boarded by the *Tecumseh*."

This amounts to holding that on account of their presumed superior education and character the avowedly "approximate estimates" made by the United States officers without having taken the usual "observations" by which alone the positions of ships can be accurately located upon the ocean, such "estimates" being made up after the capture *to support a theory* of the captors, should be allowed to preponderate over the daily record of the ship's log, noted hour by hour and mile by mile by an instrument mechanically accurate called the "log," corroborated by astronomical observations of the sun by day and the stars by night and corrected from time to time by observations of the land, which, together with the record of the engineer's log showing the time and speed of the vessel up to the moment of

meeting the blockading ship, determined the exact time at which the ship stopped and the time at which the engines started again, and determined, according to recognized rules of navigation, the exact position of the vessel on the ocean at that time.

### Familiarity with Locality on the Ocean.

His honor, the district judge, speaks of the superior familiarity of the officers of the *Tecumseh with the locality*, as if it were a place on land and not a point on the ocean, ignoring the fact that at sea there is no landmark and no possible familiarity with the locality except from the proximity with visible points on the shore; that on the ocean, in estimating distances from land, the casual navigator, at any point of the coast, has as good opportunity of determining the exact distance from land or the locality of his ship on the ocean by the familiar rules of navigation, with the aid of Government sailing charts, as has one who has been accustomed to cruise on that particular part of the ocean, however often the latter may have passed over that particular stretch of water.

The argument of the district court decree assumes that, as Lieutenant Evans and his mate were on cruising grounds with which they were familiar, there could be no difficulty in ascertaining their position from the bearing of Morro, which was in plain sight day and night, and that, because there could be no such difficulty, it is assumed that the position from the bearing of Morro light was, as matter of fact, ascertained by them on July 19, at or before 5.15 p. m., when they started for the *Newfoundland*. These officers both admit that they did not, as matter of fact, *so ascertain* their position; that they had taken no "observation" at all, and no "bow and beam" or "point bearing" since noontime of that day, and, as we have shown above, that on the following day, July 20, after the capture, when called

upon by Commander Mackenzie, they could only give "approximate estimates" as to their probable position and that of the *Newfoundland* on the previous evening.

### Superior Character.

We have nothing to say against the assumption that the officers of the United States Navy are men of superior character, but we earnestly contend that in the court-house an uneducated or unlearned witness, whose character has not been impeached or whose credibility as a witness has not been impugned, is entitled to stand on a question of preponderance of evidence on an even footing with men of the highest character. (See Sir Wm. Scott as to personal consideration and as to who is in preference to be believed. *Glierktigheit, supra.*)

### Imputation of Interest.

As to the suggestion of *interest* imputed to Captain Malcolm and his mate as "obvious" (*fol.* 247), it will be noted that the only interest Captain Malcolm has in this case is that he was master of the ship on the voyage in which she was captured and the fact that he has been accused of attempting to break the blockade at Havana, which he denies.

In his testimony *in preparatorio* (*fol.* 42) he said:

"9. Yes; I was master of the ship. No; I hadn't any interest in the ship's goods or merchandise laden on her otherwise than the interest of belonging to the ship."

As to the mate, Salkus, he answered the ninth standing interrogatory *in preparatorio* thus (*fol.* 59):

"9. Yes; as chief mate. I had no interest in the vessel except my monthly wages. I got $45, and, so far as I know, the rest of the men had only the same interest."

On the question of preponderance of proof and as to the influence of "obvious interest" attributed by the district judge to Captain Malcolm and officers and crew of the *Newfoundland* to diminish the force of their testimony, while the captors are assumed to be beyond the reach of influence of interest or bias or partisanship or any other motive, we again quote Sir William Scott in the *Glierktigheit*, 6 Rob., 60:

"The imputation of direct interest is equal or perhaps stronger on the captor than on the witnesses for the captured ship."

## Point Six.

### The Newfoundland Was Not Legally Bound "to Account for Herself."

The district judge held (*fol.* 256) that the ship having "denied that she was there"—*i. e.*, 10 miles from Havana light—"and having failed to sustain that denial by adequate proof, and having failed to give a satisfactory account of her being in that neighborhood at all, I am compelled to condemn both ship and cargo."

When captured in the gulf of Mexico 21 miles northwest from Havana the *Newfoundland* was not taken in a position or under circumstances to warrant or suggest suspicion of hostile action or intention. She was not found going into or coming out of or *near to* a blockaded port. The utmost of offense attributed to her is that her captor *suspects* that she *had been* "loitering" during some of the hours which preceded her capture, and on that she is put by the district judge in the category of a culprit, and is required to account for herself to his satisfaction because her master and crew presumed to deny the speculative assertion of the officers of the United States Navy that she was guessed to have been 10 miles from Havana light when she passed north of it.

We contend that it was error to accept the "approximate estimates" of the United States officers as fixing the position of the *Newfoundland* at a point 10¾ miles from Havana and 5 or 8 miles from land at 6.30 p. m. and 10 miles north of Havana at 8.30 p. m. on July 19 against the positive proof of her position as testified by the ship's records and the recorded observations and corrections of her positions by the master up to that hour.

It was error to put the *Newfoundland* to her denial and to proof to sustain her denial of an assertion as to her position, which rested upon the inadequate evidence from "approximate estimates" of the captors.

It was error not to accept the ship's record as testified by the master as adequate proof to sustain her denial of the assertions as to her position.

We submit that the *Newfoundland* did not "fail to sustain her denial by adequate proof," and, having shown by the highest proof that she was on a course 17½ miles north of Havana at 8.30 p. m., we maintain that in law she was not put to the requirement of giving "a satisfactory account of her being in the neighborhood at all."

We also submit that the *Newfoundland* has given a full account of her voyage and a satisfactory account of her being where she was found at 10.10 p. m., 21 miles north-northwest half west from Havana, sailing on her west course, the continuation of a course on which she had in the main been running all through the Bahama channel and Nicholas channel, and a course which was a natural course after she left the *Tecumseh* at 6.30 p. m. for either Vera Cruz or Kingston.

## Point Seven.

SUSPICION OF INTENTION CANNOT TAKE THE PLACE OF PROOF OF ACTS.

The entire case of the captors rests upon mere suspicion.

"Suspicious circumstances are not proof and cannot be raised to the dignity of evidence."
*The Wren* (6 Wallace, 582).

Mr. Justice NELSON:

"Now most of the proofs, relied on to disprove this evidence, are wholly inadmissible and incompetent as testimony in a court of justice. We cannot think that it needs any argument to show, that they do not rise to the character or dignity of testimony, in any court that respects the law of evidence.

"We agree, that in the facts and circumstances surrounding and attending the history and operation of this vessel, there are matters for *well-grounded suspicion and conjecture*, as it respects the purpose and intent with which the vessel was originally built and sent to Havana; and as she entered immediately on furnishing supplies to the enemy and receiving cargoes of cotton in return, it is not unnatural and unreasonable to suspect, that the so-called Confederate States, or their agents, had some connection, if not interest in her. *But this alone is not evidence upon which to found a judgment in the administration of justice.*" * * * (*The Wren, supra.*)

*The Flying Scud*, 6 Wall., 265.
*The Sea Witch, ib.*, 243.

Ch. J. MARSHALL:

"The only circumstance of suspicion * * * is that she was bound for Port au Prince and was taken entering the port of Jacmel. * * * This circumstance appears to be sufficiently accounted for. * * * Unquestionably Lieutenant Maley had a right to stop and to search the *Mercator* and to exercise his judgment on the propriety of

detaining her; but in the exercise of that judgment he appears to have come to a decision not warranted by the testimony presented to him. The circumstances of suspicion arising in the case were not sufficient to justify the seizure, which was made."

*Maley vs. Shattuck*, 3 Cranch, 488; *U. S. Cond. Rep.*, vol. 1, on p. 602.

CONVERTING INTENTION INTO OFFENSE.

"It is not the mere mental design which the law punishes but the overt act, in starting from or proceeding toward the prohibited port with knowledge that it is blockaded, and continuing in that course till the arrest." * * *

*The John Gilpin*, Blatchford Prize Cases, 659; 13 Federal Cases, 7373-'4-'5.

"But in such cases the *fact* of sailing must be *coupled with the intention*."

*Fitz Simons vs. The Newport Ins. Co.*, 4 Cranch, 185.
*The Nereide*, 9 Cranch, 388.
*Olivera vs. Union Ins. Co.*, 3 Wheat., 197.

"The modern law requires some overt act denoting the forbidden attempt in addition to the intention."

*The Empress*, Blatch. Pr. Cases, 175; 8 Federal Cases, p. 691.
*Fitz Simons vs. The Newport Ins. Co.* (*supra*).
*The Columbia*, 1 C. Rob., 154.

Persisting in an intention to enter a blockaded port after the warning is not attempting to enter it.

*Fitz Simons vs. The Newport Ins. Co.* (*supra*).

In this case there was a sentence of a foreign court condemning the ship. Discussing the correctness of the sentence, *Chief Justice Marshall* says:

"The persisting in the intention to enter the port after warning by the blockading force is the ground of the sentence.

"Is this intention (evidenced by no *fact* whatever) a breach of the blockade?

"This question is to be decided by a reference to the law of nations. * * * Neither the law of nations nor the treaty (between the United States and Great Britain) admits of the condemnation of the neutral vessels for the intention to enter a blockaded port, unconnected with any fact. Sailing for a blockaded port, knowing it to be blockaded, has been in some English cases construed into an attempt to enter that port, and has therefore been adjudged a breach of the blockade from the departure of the vessel. Without giving any opinion on that point, it may be observed that in such cases the *fact of sailing* is coupled with the *intention*, and the sentence of condemnation is founded on an *actual breach* of the blockade. Had this sentence averred that the brig *John* had broken the blockade or had attempted to enter the port of Cadiz after warning from the blockading force the cause of condemnation would have been justifiable. * * * But this is not the language of the sentence. An attempt to enter the port of Cadiz is not alleged, but *persisting in the intention*, after being warned not to enter, is the cause of condemnation. This is not a good cause under the treaty. * * *

"It would seem, as if, aware of the excesses which might be justified *by converting intention into offense* the American negotiators (of the treaty) had required the *union of fact with intention* to constitute a breach of a blockade."

Chief Justice Marshall, speaking of the treaty between the United States and Great Britain, from which he quotes, says, "Which is accepted to be a correct exposition of the law of nations."

Fitz Simons *vs.* Newport Insurance Co., 4 Cranch, 185.

If that is the law, as to *avowed* intention, how much more imperatively must it be the law in cases of mere *suspicion of intention, inferred from circumstances?* If converting actual expressly declared intention and purpose into offense is calculated to lead to excesses in the exercise of the power of arrest, how vastly greater and more dangerous excesses will be attempted to be justified if the courts should sanction

the attempt, which is made in this case, to convert the merest "suspicion of intention" into offense?

## Point Eight.

### The Burden of Proof.

*The Burden of Proof Rests with the Captors.*

The *onus probandi* in prize causes, it will be noticed, differs widely from that which holds in revenue and other seizure cases. In revenue causes it required an express provision of statute to throw the burden of proving innocence on the "claimant," and to change the universal fundamental rule in all causes, civil or criminal, which places the burden of proof on the actor or plaintiff and on the party who assumes the affirmative in the issue, and the rule in criminal prosecutions and actions which demands of the State proof of *guilt* beyond a reasonable doubt.

Even in revenue cases it only falls upon claimant after the Government has established a *prima facie* case and shown probable cause.

*Section* 909 *of United States Revised Statutes* declares that "in suits or informations brought, where any seizure is made on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant: *Provided*, That probable cause is shown for such prosecution, to be judged of by the court." The decisions in prize causes show that by the rules governing such courts the burden of proof of *the neutral character of the vessel or cargo* is upon the claimant, but the rule is limited to proof of neutral *ownership* or *title*, all the information as to which is presumed to be in the knowledge of claimants. No case has been found, where it extends to the proof of the acts and intention of the claimant, under the charge of violating blockade and the like, so as to require claimant, with or without previous

proof of probable cause, to prove a negative or to disprove criminal conduct or acts—in other words, to prove himself innocent.

"The *onus probandi* of *a neutral interest* rests on the claimant, but the evidence to acquit or condemn shall in the first instance come from the ship's papers and persons on board. If the *neutrality of the property* is not established finally beyond a reasonable doubt, condemnation ensues."

*The Amiable Isabelle*, 6 Wheat., 1.

This rule goes no further than "neutral interest" or neutrality of *the property.*

"The United States having at one time formed a competent part of the British Empire, their prize law was ours, and when we separated it continued to be our prize law, so far as it was adapted to our circumstances, and was not varied by the power which was capable of changing it."

*30 Hds. of Sugar vs. Boyle*, 9 Cranch, 191.
*The Siren*, p. 186.
13 *Wallace*, 389.
3 *Wharton's Digest of International Law*, § 329.

No statute of the United States ("the power which was capable of changing it") has been enacted changing the rule of prize law as administered in England on this point or extending the rule of the burden of proof beyond proof of neutral interest or property *to* that of *acts* or *intention of the claimants* alleged to be criminal.

"Prize courts are subject to the instructions of their own sovereign. In the absence of such instructions their jurisdiction and rules of decision are to be ascertained by reference to the known powers of such tribunals and the principles by which they are governed under the public law and the practice of nations."

*The Amy Warwick*, 2 Sprague, 123.

"In every case of a proceeding for condemnation upon captures made by the public ships of war of the United States, whether the same be cases of prize strictly *jure belli*

or upon public acts in the nature of captures *jure belli*, the proceedings are in *the name* and *authority* of the United States."

*The Palmyra*, 12 Wheat., 1.
3 *Wharton's Int. Digest*, p. 207, § 330.

"The question (in cases of condemnation of a vessel for breach of neutrality) is, as to *innocency* or *guilt* of the vessel, as if the transaction in which she was *implicated* was one of personal *violation* on her part."

*Judge Betts* in the case of *The Napoleon*, — Olcutt, 208.
3 *Wharton Int. Law Digest*, p. 20 (s. 330).

"Before property captured can be properly disposed of, it must be *condemned*, as prize, in a regular *judicial proceeding*, in which all parties interested may be heard. This proceeding must be had in a court of admiralty deciding according to the law of nations."

*Benedict's Admiralty*, s. 509, p. 301.

"The legality of capture is to be decided upon competent evidence and no rules are more proper for determining the competency of evidence than those which prevail in the admiralty courts."

1 *Op.*, 40 *Bradford*, 1794.
3 *Whart. Int. Law Digest*, section 330, page 200.

"It appears to be equally well settled that capture alone does not transfer any right of property to the captor the title remaining unchanged, *until a regular sentence of condemnation has been pronounced* by some court of competent jurisdiction."

3 *Whart. Int. Law Dig.*, s. 318, p. 172.

"The answer would be easily found, if the question were, what you shall do with the contraband vessel. You must take her into a convenient port and *subject her to a judicial prosecution there* in admiralty which will try, and decide, the questions of belligerency, neutrality, contraband and capture."

*Mr. Seward, Sec'y of State, to Lord Lyons*, Dec., 1861.
*MSS. Notes, Great Britain*; 3 *Wharton Int. Law Digest*, s. 328, page 173.

These citations clearly show that the judicial proceeding in prize is a *judicial prosecution* upon *a charge* of *violating neutrality* or of *violating blockade, a charge of "hostile action,"* the *penalty* for which is capture, *condemnation*, and forfeiture; that the decrees of prize courts are decrees *of condemnation*, called in the language of the authorities "*regular sentence of condemnation.*" The respondent, vessel, or cargo is dealt with as *an enemy* committing *a hostile act* against the belligerent, which the latter meets by seizure of his property and *prosecution* for *condemnation.*

This fully involves the *accusation of guilt* and the *plea of innocence;* establishes the proceeding as a prosecution of *a criminal character,* to which, by all analogies of the law and the principles and rules of evidence pertaining to criminal prosecution, must apply, such, for example, as the recognized presumption of innocence, to be overcome only by *preponderance of evidence* and the establishment of "*the proof of guilt beyond a reasonable doubt.*"

The *onus probandi*, therefore, must be held to be and to remain upon the Government, which, in alleging the thing captured to be lawful prize of war and in attempting to show a violation of blockade as *the guilty act*, which made the capture such lawful prize of war, occupies the same or an equivalent position before the court to that which it assumes in any other criminal *prosecution.*

We have not been able to find any statute rule or decision which declared the contrary to be the rule of evidence in prize causes.

In the present case we do not need to invoke for the respondents the protection of the rule in criminal cases.

The rules of evidence in civil cases as to the burden of proof are amply sufficient to sustain the claim which we assert on behalf of the respondents in the case, namely, as expressed by Mr. Greenleaf, that—

"The obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue."

3 *Greenleaf*, p. 113, s. 74.

"This is a rule of convenience, adopted not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable. It is therefore generally deemed sufficient where the allegation is affirmative to oppose it with a bare denial. Such is the rule of the Roman law. '*Ei incumbit probatio qui dicit, non qui negat.*' As a consequence of this rule the party who asserts the affirmative of the issue is entitled to begin and reply, and having begun he is not permitted to go into half his case and reserve the remainder, but is generally obliged to develope the whole."

*Ib.*, pages 114, 115.

"In civil cases where the plaintiff has introduced sufficient evidence to make out a *prima facie* case, he may rest upon this proof, and it becomes the duty of defendant to introduce evidence to rebut the case made by the plaintiff. The burden which is thus shifted has been called the weight of evidence."

In note (*a*).

Even in cases where the *prima facie* case has been established in proof, and the plaintiff is thereby entitled to shift the proof upon the defendant, the law is that "when the plaintiff and defendant have both put in evidence the burden of proving his whole case by *a preponderance of evidence* in civil cases is on the party who had the burden of proof in the beginning."

*Powers vs. Russell*, 13 Pick. (Mass.), 76; *Ib.*, note (*a*).

A *prima facie* case is not a mere suggestion of liability; it involves even in civil cases *substantial proof*, upon which, if no defensive proof is put in, the plaintiff can be said to have *proved his case*, and is entitled to a judgment in his favor upon the positive allegations of his pleadings.

In *Greenleaf*, s. 74, note *a*, cases are put which illustrate this position.

"The burden of proof is therefore fixed at the beginning of the trial by the nature of the allegations of the pleadings and it is settled as a question of law, and does not change during the course of trial."

*Ib.* (cases cited).

It only remains to apply the above rules to the facts of this case.

## Situation of the Case.

Upon a full consideration of all the testimony *in preparatorio*, the district judge reached the following conclusion:

"Taking the testimony which alone is now before the court there is nothing in it which shows, or tends to show, that the *Newfoundland* at the time of capture or at any other time was heading for the port of Havana or any other port."

Again:

"So far as its examination has extended no case has been found where a sentence of condemnation was passed upon such a state of facts as is presented in this record. How far short the cases cited fail in showing cause for condemnation the circumstances hereinbefore recited demonstrate.

"These circumstances do no more than create a suspicion, that there was an intention to enter a Cuban port in violation of the blockade, but suspicion, however well founded, is not proof, and cannot be accepted in place of evidence.

"*There must be some overt act denoting an attempt to do the thing forbidden*, some *fact*, in addition to the *proved intention* to commit the infraction, which shows that the unlawful intent is persisted in and is being carried into execution." (*U. S. vs. Newfoundland; Decree of the district court of South Carolina, filed August* 17, 1898.) *Transcript* (*fol.* 24).

We maintain that that decree contains an absolutely correct expression of the law, even if there had been proof of facts which could serve as a basis of a well-grounded "suspicion of intention" on the part of the *Newfoundland* to violate the blockade.

We claim that no such facts were shown in the testimony before the prize commissioners, and we now claim that after all the testimony on both sides has been taken that no fur-

ther or other facts have been shown which would serve as a basis even of "well-grounded suspicion" of an intention on the part of the *Newfoundland* to violate the blockade at Havana or at any other port, and that *not a single overt act has been proved or suggested in any part of the evidence.* The district judge has allowed the Government the privilege of amending the libel and of taking further proof, giving it the opportunity of proving some overt act in violation of the blockade, which, coupled with circumstances of well-grounded suspicion, would show a guilty intent and amount to an act of hostility against the United States Government, sufficient to justify a sentence of condemnation of the ship and cargo, or, at least, to excuse the marine trespass.

The widest possible range has been taken by the Government in its testimony, and as a result the matter is (as we will show) left just where it was on 17th August, 1898, to wit, as a total failure of proof and as a case of wholly unjustifiable exercise of power, without probable cause, an unmitigated marine trespass, without possible *legal* justification. What is the charge in the libel?

"That the *Newfoundland* and her cargo were captured" (an admitted fact) "and are lawful prize of war."

This is denied in the answer.

How are the vessel and cargo attempted to be shown in the evidence to be "lawful prize of war?"

What is the overt act charged?

Taking the testimony produced by the Government, was the overt act of hostility the invasion of the Government of the United States by steaming through the Old Bahama channel and the Nicholas channel and out of the latter past the straits of Florida into the waters of the gulf of Mexico? For it was actually in the latter water that the vessel was seized, at the moment of capture heading, as one Government witness said, west by north, 18 to 21 miles northwest from Havana entrance, and more than that distance, probably 25 miles at least, due north of the extreme western coast of

Cuba, and increasing that distance every moment of her progress westward. As a British vessel, a ship of a neutral power, had the *Newfoundland* or had she not the right to be where she was arrested? We will assume that this will be conceded. Had she come to that point having violated the blockade by entering into any blockaded port and was she *found coming out of* such blockaded port and overhauled after being chased while endeavoring to escape?

This is not even pretended.

Why, then, was she arrested?

Had she been anywhere where she had no lawful right to be?

Is it an offense under the law of nations to pass on a great ocean highway within *sight* of a blockading fleet of the United States Navy?

This was the utmost of her offending, as far as the testimony of the Government, stretched to its furthest limit, can be made to reach. She did not come near the cruising ground of either of the last two blockade ships. According to the estimate of her captors, she was three miles from the blockade ship of war *Mayflower* when the latter "picked up a faint light to the north of him," he being himself "six miles from the shore, near Havana entrance," and the faint light, assumed to be that of the *Newfoundland*, being thus nine miles from the shore and in an opposite direction from the *Mayflower* than was the port of Havana from the *Mayflower*—that is, far away to the northward.

As in the case of the *Tecumseh*, the *Newfoundland* was, by the Government's own showing, three miles clear to the northward of the blockading vessels. For either of them to reach her they had to leave their respective patrol cruising ground—to steam two or three miles, if not more (as we have shown), outside of its extreme circle in order to bring her in contact with them.

Even if she had been found within the limits of the cruising ground of either of those vessels, without proof of

her having come out of some blockaded port, or proof of her having tried to enter, or being taken in the act of heading for some port known to her to be blockaded, we make bold to assert that her arrest would have been wholly illegal and without excuse.

It is "an established rule of the law of maritime warfare, according to which neutral property, on board a vessel under a neutral flag, whilst on its way to another neutral port, is not liable to capture or confiscation by a belligerent as lawful prize of war; that such trade when carried on between neutral ports has, according to the law of nations, ever been held to be absolutely free." * * *

*Opinion by Members of the Maritime Prize Commission, &c.*, 3 Wharton Int'l Dig., § 362, p. 401.

"To the eye of international law a real breach of blockade is committed only when a neutral vessel *attempts by force or stratagem to enter or leave* a blockaded port."

*Bluntschli Modern International Law*, § 833.

* * * "In every case the vessel can be *lawfully* captured *only while in the act of attempting to violate the blockade*" (*ib.*, § 835).

3 *Wharton Int. D.*, § 362, p. 401.

"The right to treat the vessel as an enemy is declared by Vattel to be founded on the attempt to enter." * * * (*Vattel*, b. 3, s. 117.)

*Marshall, C. J., in Fitz Simons vs. Newport Ins. Co.*

## Point Nine.

### What Things Must be Proved.

On the question of blockade three things must be *proved.*

(1.) The existence of an actual blockade.

(2.) The knowledge of the party.

(3.) Some *act* of violation, *either by going in* or *coming out* with a cargo laden after the commencement of the blockade.

*Sir Wm. Scott in The Betsey* (1 Ch. Rob., 92*a*).
*The Mercurius* (*ib.*, 82).
1 *Kent's Comm.*, * p. 144.

### (1.) The Existence of an Actual Blockade.

*Blockade to be Valid Must be Effective.*

"Ports not effectually blockaded by a force capable of investing them have not yet been declared (by the law of nations) in a state of blockade. * * * If the effectiveness of the blockade is dispensed with, then every port of all the belligerent powers may at all times be declared in that state (of blockade) and the commerce of neutrals is thereby subjected to universal capture. But if this principle is strictly adhered to, the capacity to blockade will be limited to the naval force of the belligerent, and of consequence the mischief to neutral commerce cannot be very extensive." * * *

*Mr. Marshall, Sec. of State, to Mr. King, Sep.* 20, 1800; *MSS. Inst. to Ministers;* 2 Am. St. Pap. (For. Rel.), 1800.

"Mere liability by neutral vessels to capture by belligerent cruisers hovering around a coast cannot constitute a blockade of a port of such coast."

*Mr. Madison, Sec. of State, to Mr. King, Sep.* 20, 1800; *MSS. Inst. to Ministers;* 3 Wharton Int'l Dig., § 360, p. 369.

"No maxim of the law of nations is better established than that a blockade shall be confined to particular ports and that an adequate force shall be stationed at each port to support it. *The force should be stationary and not a cruising squadron* and placed *so near* the entrance of the harbor, or mouth of the river, as to make it *evidently* dangerous for a vessel to enter. I have to add that a vessel *entering the port* ought not to be seized, except in returning to it after being warned off by the blockading squadron stationed *near it*."

*Mr. Monroe, Sec. of State, to Mr. de Onis, March* 20, 1816; *MSS. Notes, For. Leg.*

Commander Mackenzie, the senior officer of the Cuba blockading force, admits that the blockade was "light" and the force not stationary (*fol.* 89).

"The blockade was pretty light. We were covering about five points of the compass on the bearing from Morro."

A Non-effective Blockade is Not Valid or Binding.

"Blockades in order to be binding must be effective; that is to say, maintained by a force sufficient to prevent access to the coast of the enemy" (*Declaration of Paris*, 1856).

"Although it is true that the United States did not sign and has not acceded to the declaration of Paris of 1856, our reserve in this respect was and has not been occasioned by any doubt as to the soundness of the rule in regard to blockades which that instrument embodies. That rule has always been regarded by this Government as the wisest, especially in the interests of neutrals, and as founded upon the texts of the public law generally received."

*Mr. Evarts, Sec. of State, to Mr. Shishkin, June* 12, 1877; 3 Wharton Int. Dig., § 361, p. 375.

"Only such blockades as shall be duly proclaimed and *maintained by adequate force*, in conformity to the law of nations, will be observed and respected by the United States."

*Mr. Seward, Sec. of State, to Mr. Sullivan, June* 13, 1867; 3 Wharton Int. Dig., p. 374.

It certainly has not been *proved* in this case that the blockade of the ports of Cuba was "effective."

Commander Mackenzie himself says (*fol.* 114):

"Take Havana—that is an *absolutely easy* place to run. Take Wilmington during the civil war, with thirty vessels at each of the entrances, and at Havana they had only 6 or 8 and no shoals, and it was an absolutely easy matter, because you have to catch the man outside.

"But if the blockade is not in the main effective—if it can be easily eluded, * * * then such blockade is *not valid*."

*Wharton Com. Am. Law*, § 233.
3 *Wharton Int. Dig.*, § 362, p. 405.

(2.) The Knowledge of the Party.

"The notice of a blockade must *not be more extensive* than the blockade itself, otherwise the neutral will be *at liberty to disregard* such notice, and will *not* be liable to the penalties attending a breach of blockade, for *afterwards attempting to enter the port* which is really blockaded."

*The Hendrick & Maria* (1 Ch. Rob., 148).

Where an officer of the blockading squadron notified the neutral merchantman that *all Dutch ports were blockaded*, whereas the blockade was confined to Amsterdam. The merchantman then attempted to get into Amsterdam and was *caught in the very act*. She was, nevertheless, restored, and the court refused to condemn her, on the ground, as said by *Sir William Scott*, that

"The notice is, I think, in point of authority illegal; at the time it was given there was no blockade which extended to all Dutch ports. A declaration of blockade is a high act of sovereignty and a commander of a king's ship is not to extend it. * * *

"The notice is also I think as illegal in effect, as in authority; it cannot be said that such a notice though bad for other ports is good for Amsterdam. It takes from the neutral all power of election as to what other ports of Hol-

land he should go, when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral to this kind of distress, *and I am of opinion that if the neutral had contravened the notice he would not have been subject to condemnation.* * * * I think the conversation of this man was not an expression of final intention; but that of a man deliberating under difficulties in which he was *unfairly* placed. The master said 'he could not answer to his owners to go to any place but Holland.' The commander does not point out to him any ports of Holland, to which he might go, but tells him he might go to Bremen, Hamburgh, or England. * * * *I think the notice was erroneous and, besides, not broken;* and *therefore*, I restore this ship."

This case was quoted with the highest approval by the lords of the privy council in Northcote *vs.* Douglas (10 Moore, P. L., 59).

Captain Malcolm's instructions were to go to Caybairien or Sagua, if those ports were not blockaded (*fols.* 25, 155). He asked Lieutenant Titus, of the United States steamer *Badger*, "about the blockade," and was told that "*all the ports of Cuba were blockaded*" (*fol.* 27). His freedom of action was thereby at once destroyed. He "could not answer to his owner" if he did not go to Caybairien or Sagua. The commander does not point out to him any ports of Cuba to which he might go to land his cargo. According to the law as laid down by Sir William Scott, "if the neutral had contravened the notice he would not have been subject to condemnation," and if Captain Malcolm had really attempted to go to Havana (which was blockaded) the *Newfoundland* and her cargo could not be condemned.

In this case there was an additional *misrepresentation* by Lieutenant Nickerson, of the *Tecumseh*, as to the extent of the blockade of Havana itself (*fol.* 146), when Nickerson took the care to inform Malcolm that there were 30 ships of war along the westward coast of Cuba, and then admits in his testimony that there were not so many, and he knew

it. *Bona fides* is required on both sides, as well from the ship of war as from the merchantman.

See *Sir Wm. Scott in The Shepherdess* (5 Ch. Rob., 263).

(3.) Some Act of Violation, Either by Going In or Coming Out with a Cargo Laden After the Commencement of the Blockade, Must Be Proved.

See *The Betsey, The Mercurius*, 1 Kent Com. and other authorities, *supra*.

As to the Sufficiency of Proof Required After an Order for Further Proof by Plea and Proof.

In the case of *The Magnus* the cargo had been referred to further proof by "plea and proof." *Sir Wm. Scott* said:

"In this case the proof that was required was of the most solemn nature by 'plea and proof.'"

And—

"In this case therefore where proof of a more solemn nature had been ordered it could not be expected that less than ordinary proof would be received: plea and proof is an awakening thing—it admonishes the parties of the difficulties of their situation and calls for *all* the *proof* that their case can supply. * * * All proofs of a secondary nature must fail to give that satisfaction which the court is entitled to demand."

*The Magnus*, 1 Ch. Rob., 27.

A Case of Arrest Without Probable Cause.

The captors have wholly failed on "plea and proof" to show any overt act on the part of the *Newfoundland* to which circumstances of suspicion could be attached to make a case of intentional violation of the law of nations by her master or owners or charterers or by the owners of the cargo.

*Suspicion of "loitering"* based upon *inference* of more time having been consumed than it is assumed "ought to have been consumed" in passing at an assumed (not proved) rate of speed between two points on the ocean (which were not proved, but only "approximately estimated," and which were assumed in order to sustain a theory of the captors) is, we submit, not proof of an "overt act."

We have shown that the attempted inference of an undue amount of time being so consumed is unsustained by legal proof; that it rests wholly upon a mistake of fact as to the actual and possible rate of speed of the accused ship; that it is based upon erroneous assumptions as to the respective positions of the *Newfoundland*, viz., the point on the ocean where she is said to have met the *Tecumseh* at 5.35 p. m., July 19, the points where she was *supposed* to have been at 8.20 p. m. and at 8.30 p. m. and at 10.05 p. m., and upon erroneous "approximate estimations" as to the hour at which she was released by the *Tecumseh* and the distance from land and from Havana light.

We have also, we think, demonstrated that the *Newfoundland* could not, as a matter of physical possibility, have deviated between 4 p. m. and 10 10 p. m. from her westerly course through Nicolas channel in the way she must have deviated if the theory of the captors were true; that she could not have traversed the courses and distances ascribed to her in the "tracing" prepared by the captors to sustain their theory, and could not have steamed the number of miles so attributed to her at either her average rate of speed

or at the highest known rate of speed of which she was capable "in the smoothest of waters."

We have shown, we think, by the overwhelming preponderance of legal proof, that the *Newfoundland* did not, as matter of fact, at any time, deviate to the southward from the westerly course on which she had steamed through Nicolas channel between 4 o'clock and 10.10 p. m., and on which course she was found at 10 o'clock p. m. still steaming west, and that she did not at any time change her course to the south of west or in the direction of Havana.

It is admitted that there is no evidence of an attempt to enter Havana or any other port of Cuba, or of her heading for Havana or any other blockaded port at any time.

We ask, then, that the judgment of this court be that the innocent neutrals in this case were entitled to the release of the vessel and cargo on the testimony *in preparatorio*, and are now, upon the evidence and "further proof," entitled to such release, and also for their damages and costs as for an illegal arrest and detention without "*probable cause.*"

THEODORE G. BARKER,
*Proctor for Respondents, Appellants.*